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No.

In The Supreme Court of the United States

OCTOBER TERM, 1984

READING COMPANY
AND
CENTRAL JERSEY INDUSTRIES, INC., PETITIONERS

v.

JOSEPHINE SCHWEITZER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN H. LEWIS, JR.*
WILLIAM E. ZEITER
WILLIAM H. CLARK
JOHN F. STILLMUN, III
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000

Attorneys for Petitioner
Reading Company

Of Counsel:
MORGAN, LEWIS
& BOCKIUS

JOHN W. MORRIS
Pierson & Morris, P.C.
Suite 1100
1411 Walnut Street
Philadelphia, PA 19102

STANLEY WEISS*
DEAN R. MAY
744 Broad Street
Newark, NJ 07102
(201) 622-7711

Attorneys for Petitioner
Central Jersey Industries, Inc.

Of Counsel:
CARPENTER, BENNETT
& MORRISSEY

*Counsel of Record

QUESTIONS PRESENTED

1. Whether a reorganization court has the power to deal with and provide for latent future asbestos-related toxic tort claims as part of a reorganization of a debtor corporation under Section 77 of the Bankruptcy Act?

2. Whether, assuming that a reorganization court has such authority, the court may bar such future claims, where the rail operations out of which such claims arose are, during the course of the reorganization, transferred to a solvent successor railroad?

PARTIES TO THE PROCEEDING

The decision of the court of appeals was issued in 19 consolidated appeals. Petitioner Reading Company was an appellee in 16 of the appeals ("the Reading cases"), but was not a party to the other three appeals ("the CJI cases"). Josephine Schweitzer, Mildred Siebert, George A. Wentzel, Elaine Schwambach, Marilyn L. Frank, Martin H. Scholl, Earl R. Fenstermacher and Carl Scholing each were the named plaintiff in a separate trial court action to which Reading was a party, were appellants in separate appeals to the court of appeals, and are respondents herein. Consolidated Rail Corporation ("Conrail"), was a defendant in each of the eight separate underlying trial court actions involving Reading, was the appellant in eight separate appeals from those underlying actions, and also is a respondent herein. The Penn Central Corporation appeared in the court of appeals in the Reading cases as amicus curiae. Petitioner Central Jersey Industries, Inc., was an appellee in the remaining three appeals together with its predecessor, The Central Railroad Company of New Jersey, and its former Trustee, Robert D. Timpany. Andrew Thomas, Trudell Thomas, Frank Pongrac Sr., Robert A. Bingle, Alexander Redelico, Evelyn Redelico, Joseph C. Popadick, Elma Popadick, Edward Witos, Philomena Witos, Mark Gammel, Harry Guralchuk, Steve Palichak, Joseph M. Pinto, Frank Pongrac, Jr., John Sowizral, Harry Wilson, George J. Zeblisky, Robert J. F. Brobyn, and Richard Middleton were appellants in the CJI cases below and are respondents herein. Conrail was an intervenor in at least two of the CJI cases.

DESIGNATION OF CORPORATE RELATIONSHIPS

Reading Company is not owned by any parent corporation. Allentown Terminal Railroad Company, East Pennsylvania Railroad Company, Eastern Services, Inc., Ironton Railroad Company, and Pennsylvania - Reading Seashore Lines are subsidiaries of Reading. Reading does not have an ownership interest in any other subsidiary (excepting only wholly owned subsidiaries). Reading is involved in a joint venture with Combustion Engineering, Inc.

Central Jersey Industries, Inc., is not owned by any parent corporation. CJI has a majority ownership interest in the Dover & Rockaway Railroad Company and the Mount Hope Railroad Company. CJI does not have an ownership interest in any other subsidiaries (excepting only wholly owned subsidiaries). CJI is an affiliate of Triangle Industries, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Reading Company and Central Jersey Industries, Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, 1a-18a) is reported at 758 F.2d 936. The opinion of the district court in the Reading cases (App. *infra* 19a-26a) is reported at 36 Bankr. 469. The opinion of the district court in the CJI cases (App. *infra* 38a-44a) is reported at 38 Bankr. 686.

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1985 (App. *infra*, 53a-59a). A petition for rehearing in the CJI cases was denied on April 26, 1985 (App. *infra* 60a-61a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Section 77 of the Bankruptcy Act of 1898 are set forth in a statutory appendix (App. *infra*, 100a-110a).

STATEMENT

On November 23, 1971, Reading Company, which was then a railroad engaged in interstate commerce, filed a petition for reorganization under Section 77 of the Bankruptcy Act of 1898 (the "Bankruptcy Act"), formerly 11 U.S.C. § 205 (App. *infra*, 21a). The Central Railroad Company of New Jersey ("CNJ") had filed a similar petition on March 22, 1967 (App. *infra*, 38a). Reading and CNJ were among several major railroads in the Northeast region that filed for reorganization at approximately that time. While Reading and CNJ were in reorganization, Congress passed the Regional Rail Reorganization Act of 1973 (the "Rail Act"), 45 U.S.C. §§ 701-794, to preserve the vitally important Northeast rail transportation system in the face of the serious financial crisis caused by the bankruptcies of petitioners and the other major Northeast railroads. The Rail Act established a method for preserving the Northeast rail lines by transferring the rail assets of the Northeast railroads in reorganization to the newly formed Consolidated Rail Corporation ("Conrail"), and at the same time provided

for the liquidation or reorganization of the remaining assets of such railroads, which had been incapable of reorganizing as railroads on an income basis as provided under Section 77 of the Bankruptcy Act.

The first step under the Rail Act procedure is a judicial determination that the debtor railroad is incapable of an income-based reorganization. *See* 45 U.S.C. §717(b). Following such a determination, the Rail Act requires the debtor railroad to divest itself of all rail related property and interests and to convey such property and interests to Conrail. After conveying all of its railroad properties and interests to Conrail, the debtor railroad may then either liquidate its remaining assets or formulate a plan of reorganization to benefit its creditors and enable it to achieve a fresh start. *See* 45 U.S.C. §791.

The Honorable J. William Ditter, Jr. of the United States District Court for the Eastern District of Pennsylvania presided over the Reading reorganization proceedings. After the Rail Act became effective, Judge Ditter made the requisite review of Reading's prospects for an income-based reorganization and determined that Reading could not successfully be reorganized as a railroad. *In re Reading Company*, 378 F.Supp 474 (E.D. Pa.), 478, *aff'd*, 384 F.Supp. 895 (Regional Rail Reorg. Ct. 1974). As a consequence of this finding, Reading was required to transfer all of its rail properties and interests to Conrail.

On April 1, 1976, Reading conveyed all of its rail properties and interests to Conrail. These properties and interests included the real estate comprising the Reading rail system, all designated rail assets, all track and other track materials, all books and records, including employee records, all furniture, supplies, and equipment, and other current assets. In accordance with the provisions of the Rail Act, Conrail offered employment to all

former active Reading employees. As of April 1, 1976, Reading ceased to operate as a railroad.[1] The only assets that Reading retained following the conveyances to Conrail were certain non-rail properties, a trucking company, some marine equipment, other investments, a claim against Conrail and the United States for the value of the assets that were transferred, and its federal income tax net operating loss carry-forwards ("NOL's").

In due course, Reading's Trustees formulated a plan of reorganization with respect to Reading's remaining assets (the "Reading Plan"). The Trustees presented the Reading Plan in its final version to Judge Ditter on June 25, 1979. The Reading Plan was modeled after the Penn Central plan of reorganization, and was structured to preserve one of Reading's principal assets, the federal NOL carry-forwards.

Judge Ditter approved the Reading Plan on May 21, 1980 and confirmed the Reading Plan on September 25, 1980, following a vote of Reading's creditors (App. *infra*, 23a). Pursuant to Order No. 2004 of the Reorganization Court (the "Consummation Order"), the Plan was consummated on January 1, 1981 *(Id)*. In accordance with the Consummation Order, the books and accounts of the former Reading Company were closed at 11:59 p.m. E.S.T., on December 31, 1980, and the books and accounts of the reorganized Reading Company were opened at 12:00 a.m., E.S.T., on January 1, 1981 *(Id)*. The Consummation Order further provided that the assets of the former Reading were transferred to the reorganized Reading free and clear of any and all claims of the former Reading, its creditors, claimants, and stockholders. In addition, the Consummation Order provided that the

[1] Pursuant to the express provisions of the Rail Act, Reading and CNJ continued to be reorganized under the railroad reorganization provisions of Section 77 of the Bankruptcy Act. *See* 45 U.S.C. § 791.

former Reading and its Trustees were discharged and released forever from any and all claims (App. *infra*, 24a).

CNJ was also required to convey substantially all of its rail properties to Conrail on April 1, 1976 and subsequently formulated a Plan of Reorganization (the "CNJ Plan") based upon its retained assets, which were comprised of cash, certain non-rail properties, its claim under the Rail Act and significant NOL's. It was reorganized as Central Jersey Industries, Inc. ("CJI") on September 14, 1979 (App. *infra*, 38a).

Following consummation of the Reading Plan, several former Reading railroad workers and representatives and survivors of former Reading railroad workers (hereinafter referred to collectively as "the Reading plaintiffs") filed personal injury actions against Conrail and the reorganized Reading, purporting to assert claims arising under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51-60, and related statutes. The plaintiffs are seeking to recover for injuries allegedly related to the railroad workers' exposure to asbestos, which injuries were latent before and became manifest after the transfer of the rail assets by Reading to Conrail and the Reading Consummation Order. In each of the Reading cases, Reading moved to dismiss on the basis that the plaintiffs are barred by the Consummation Order or otherwise from asserting their claims against the reorganized Reading. The plaintiffs and Conrail opposed Reading's motions. The various FELA and related actions were transferred to Judge Ditter for purposes of adjudicating the motions to dismiss. By an Opinion and Order dated January 10, 1984, Judge Ditter granted Reading's motions, finding that the plaintiffs' claims were barred by the Consummation Order and had been discharged in the Reading reorganization proceedings (App.

infra, 19a-28a). Judge Ditter then transferred the cases back to the various judges to whom they originally had been assigned. Those judges entered final judgments pursuant to Rule 54(b), finding that Judge Ditter's ruling was a final decision as to Reading's rights and liabilities and that there was no just reason to delay entering judgment in Reading's favor (App. *infra*, 29a-37a).

Central Jersey Industries, Inc. was also sued under the FELA and related statutes following its reorganization by a number of former CNJ railroad employees (hereinafter referred to as the "CJI plaintiffs"). Central Jersey Industries, Inc. obtained an injunction against the prosecution of such suits from its reorganization court on the ground that the claims were barred by its Consummation Order and had been discharged in the reorganization proceedings (App. *infra*, 38a-52a).

The Reading plaintiffs, the CJI plaintiffs, and Conrail appealed to the United States Court of Appeals for the Third Circuit. The court of appeals reversed the judgments of the district courts and remanded the various cases for further proceedings (App. *infra*, 1a-18a, 53a-59a). The court held "that, as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury." (App. *infra*, 14a).

From this premise that the plaintiffs' FELA causes of action did not exist until after the date of the Consummation Orders, the court of appeals concluded that the reorganization courts lacked the power to discharge plaintiffs' claims because their FELA claims were not claims "within the meaning of section 77." (App. *infra*, 8a). The court rejected the argument that the broad language of Section 77(b), which defines "claims" as, *inter alia*, "interests of whatever character", includes a person holding a contingent asbestos-related FELA claim (App. *infra*, 14a-15a). The court held that plaintiffs, at

the time of alleged exposure, had "no legal relationship" with their employers from which an "interest", within the meaning of Section 77, could flow (App. *infra*, 15a).

On June 16, 1985, Circuit Judge Robert B. Krupansky, who presided over the Erie Lackawanna reorganization prior to his elevation to the Sixth Circuit and who continues to do so by designation, entered an order expressly declining to follow the decision of the court of appeals in these cases and holding that "the discharge [of Erie Lackawanna] under Section 77 and the Bankruptcy Act is an absolute bar to the post confirmation [FELA and other] claims asserted herein." *In re Erie Lackawanna Railway Co.*, No. B72-2838, slip op. (N.D. Ohio June 18, 1985) (App. *infra*, 62a, 87a-88a).

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the power of a reorganization court to deal with claims attributable to exposure to occupational diseases, such as asbestosis and mesothelioma, that are characterized by long latency periods.[2] The court of appeals, in an essentially contemporaneous decision, recognized the power of a reorganization court to deal with such claims by approving the appointment of a guardian ad litem to represent latent future asbestos-related claimants in the reorganization proceedings. *See In re Amatex Corporation*, 755 F.2d 1034 (3d Cir. 1985). But in the present

[2] For purposes of this Petition, "exposure" refers to the time or times at which an individual comes in contact with asbestos fibers. "Manifestation" refers to the development of clinically recognizable symptoms of a disease. "Latency period" refers to the time between exposure and manifestation. "Latent" or "subclinical" refers to the state of an injury as it exists prior to manifestation. "Latent future claim" refers to a potential claim for injuries that are latent at a given time, but are expected to manifest in the future.

cases, the Court of Appeals has vitiated its essentially concurrent decision in *Amatex* by holding that a reorganization court is powerless to deal with the rights of latent future claimants arising out of preconsummation tortious conduct by the debtor. As stated by Judge Krupansky: "The Third Circuit failed to address the apparent contradiction between its decisions in *Amatex* and *Schweitzer*." *See Erie Lackawanna* (App. *infra*, 79a).

This "severely constrict[ed]" (as characterized by Judge Krupansky, App. *infra*, 72a) view of the powers of a reorganization court is strikingly inconsistent with the decisions of this Court under the Bankruptcy Act, which have repeatedly emphasized, particularly in railroad reorganizations under Section 77, the broad and flexible powers of a reorganization court. From a practical point of view, the decision of the court of appeals will severely handicap future reorganization courts in dealing with latent future toxic tort claims, and will heavily bias future reorganizations in the direction of straight liquidations, leaving future tort claimants with no viable recourse against either the debtor or the sold assets. Straight liquidation is, moreover, inconsistent with both the obvious Congressional purpose in fashioning the reorganization provisions of the bankruptcy laws and with this Court's repeated statements that a principal goal of bankruptcy administration is the maximization of the value of the estate. Finally, the decision of the court of appeals ignores the legitimate expectations of participants in the long and difficult process of negotiating an equitable plan of reorganization, and destroys the finality and certainty necessary to promote the compromise of diverse creditors' claims.

1. Rather than dealing with any of the subsidiary issues presented in these cases, the court of appeals based its decision upon its holding that a reorganization court

lacks the power to deal with the claims of employees and former employees of the debtor who have suffered only subclinical injury from occupational exposure to asbestos. In so doing, the court of appeals ignored: a) the holdings of this Court that the power of a reorganization court to deal with claims is unaffected by the precise time - pre or post reorganization - when the affected cause of action is deemed to have technically "arisen" under the underlying substantive law; b) the sweeping and expansive language used by Congress in Section 77; and (c) the teachings of this Court that bankruptcy law gives "assurance of a remedy that can be moulded and adapted to the needs of the occasion." *Brown v. O'Keefe*, 300 U.S. 598, 605 (1937).

a. This Court has consistently held that a bankruptcy court has the power to deal with a potential future claim at a time before it has technically "arisen" under the underlying substantive law. *See, e.g., Maynard v. Elliott*, 283 U.S. 273 (1931) (endorser of unmatured promissory note); *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549 (1915) (surety which has not yet performed under matured bond).

b. Moreover, in Section 77(b) of the Bankruptcy Act, former 11 U.S.C. §205(b), Congress employed definitions of "claims" and "creditors" which this Court has characterized as "sweeping" and "all-inclusive". *Gardner v. New Jersey*, 329 U.S. 565, 573, 575-76 (1947). Section 77(b) defines "creditors" as "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act." (App. *infra*, 101a). "Claims" are defined to include "debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." (App. *infra*, 101a-102a). In *Gardner*,

this Court observed that "[w]hen §77 is read against this historical background and in light of practical requirements, we cannot conceive that Congress gave the reorganization court power less replete than the sweeping language of §77 suggests." 329 U.S. at 577-78. A fair reading of the phrase "other interests of whatever character" must include any inchoate interest arising under the FELA and related statutes possessed by an employee of a rail carrier at the time he or she suffers subclinical injury due to occupational exposure to asbestos. While it is a question of first impression in this Court, the commentators have had no difficulty in concluding that contingent tort claims are within the scope of Section 77(b). *See* 5 *Collier on Bankruptcy* ¶77.20 at 602 (14th ed. 1978); Note, *Relief From Tort Liability Through Reorganization*, 131 U. Pa. L. Rev. 1227, 1245 (1983) (bankruptcy courts possess the power to consider future tort claims and fashion appropriate relief consistent with the purposes of reorganization).

The court of appeals, however, departed from the clear language of Section 77 by holding that a "legal relationship" was required in addition to "interests of whatever character" set forth in Section 77 (App. *infra*, 15a). After imposing this non-statutory requirement, the court of appeals then held, without any factual support in the record, that employees have "no legal relationship" with their employer from which an "interest", within the meaning of Section 77, could flow (App. *infra*, 15a). *See Erie Lackawanna* (App. *infra*, 73a-74a), wherein Judge Krupansky stated:

> "Thus, by emphasizing the injury element of the FELA tort claims and ignoring the express definitions of "claim" and "creditor", and further by mandating the manifestation of injury as a prerequisite to the existence of a "claim" or "right" cognizable in

> bankruptcy, the Third Circuit literally read into the Section 77 definitions of "claim" and "creditor" the provability and "right to payment" requirements that had been expressly deleted from those definitions.
>
> * * * *
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> The argument, [that employees had no "legal relationship" with their employer], however, ignores the statutory "legal relationship" imposed by the FELA upon former railroad employers to provide their employees with a safe place to work."

c. Aside from Section 77(b) itself, the general teachings of this Court dictate that the court of appeals erred in holding that the reorganization court lacked the power to deal with future tort claims arising from preconsummation exposure. In upholding Section 77 itself, the Court stated that "[f]rom the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power." *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry Co.*, 294 U.S. 648, 668 (1935). In *Brown v. O'Keefe*, this Court held that "the malleable processes of courts of bankruptcy give assurance of a remedy that can be moulded and adapted to the needs of the occasion." 300 U.S. at 605. The decision of the court of appeals, however, denies to a reorganization court the power to mould and adapt a remedy to the massive problem of asbestos-related injuries.

2. The present petition presents this Court with an opportunity to deal with an important and recurring question of bankruptcy law which otherwise may not be decided by this Court for a substantial number of years.

a. Asbestos personal injury litigation is a major national problem. A 1983 Rand Corporation study cites estimates placing the number of deaths expected over

the next 30 years from asbestos-related causes at from 74,000 to 265,000. J. Kakalik, P. Ebener, W. Felstiner, M. Shanley, *Costs of Asbestos Litigation*, 3 (1983) (App. *infra*, 89a-99a, 91a). It has been estimated that by the end of 1982 about $1 billion in compensation and litigation expenses had been spent on more than 20,000 open and closed asbestos claims and that costs to close current claims were running at a rate of more than $100,000 per claim. *See Oversight on Occupational Disease, 1984: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor & Human Resources*, 98th Cong., 2nd Sess. 109, 124 (1984) (Prepublication copy of an executive summary of Rand Corporation study entitled *Variation in Asbestos Litigation Compensation and Expenses* (April 19, 1984)).

b. This massive and unexpected flood of personal injury claims has caused several major corporations to seek relief under the federal bankruptcy laws. See *In re Amatex Corp.*, No. 82-05220K (Bankr. E.D.Pa.); *In re Johns-Manville Corp.*, Nos. 82 B 11656 - 82 B 11676 (Bankr. S.D.N.Y.); *In re UNR Industries, Inc.* Nos. 82 B 9841 - 82 B 9851 (Bankr. N.D. Ill.). The central issue in these proceedings is precisely the issue presented here - whether a reorganization court has the power to deal with future tort claims for latent asbestos-related injuries. The various reorganization courts have differed as to whether they possess such power. *See In re Amatex Corp.*, 30 Bankr. 309 (Bankr. E.D.Pa.), *aff'd*, 37 Bankr. 613 (E.D.Pa.1983), *rev'd*, 755 F.2d 1034 (3d Cir. 1985); *In re Johns-Manville Corp.*, 36 Bankr. 743 (Bankr. S.D.N.Y.1984), *appeal denied*, 39 Bankr 234 (S.D.N.Y.1984), *appeal permitted*, 45 Bankr. 833 (S.D.N.Y. 1985); *In re UNR Industries, Inc.*, 29 Bankr. 741 (N.D. Ill. 1983), *appeal denied*, 725 F.2d 1111 (7th Cir. 1984), *on reference*, 46 Bankr. 671 (Bankr. N.D. Ill. 1985). The

decision of the Court of Appeals for the Third Circuit is the only appellate decision on this question, and it holds that a reorganization court lacks the power to fashion a remedy for future latent tort claimants. Given the preliminary status of the Manville, et al. proceedings, and the many years required to finalize a plan of reorganization, it is unlikely that this Court will have the opportunity - other than in these cases - to address this question for several years.[3]

c. Unless corrected by this Court, the decision of the court of appeals will have precedential impact upon these other reorganization proceedings. Unlike the Bankruptcy Act, the Bankruptcy Code contains in Section 101 a single unified set of definitions applicable to all proceedings under the Code. *See* 11 U.S.C. §101. Thus the railroad reorganization and the corporate reorganization provisions are now on a common footing as to the technical definitions of "claim," "creditor," etc.[4] Accordingly, the decision of the court of appeals, unless this Petition is granted, is likely to be, for some time, the

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[3] The *Amatex* opinion was filed on February 22, 1985. A Petition for Rehearing was denied on April 2, 1985. The time for filing a Petition for Certiorari in the *Amatex* case, therefore, runs until on or about July 1, 1985, after the filing date of this Petition. Although a Petition for Certiorari has not yet been filed in the *Amatex* case, counsel for petitioners in this case have been informed that at least one of the parties in the *Amatex* case intends to file such a Petition. If so, this Court will be provided with the unique opportunity to address both the power of a reorganization court to deal with latent future tort claims and the manner of doing so.

[4] While it is true that the legislative history of § 101 of the Code indicates that the draftsmen intended that the Code definition of "claim" would be "even broader . . . than is found in the present debtor rehabilitation chapters," S. Rep. No. 989, 95th Cong., 2nd Sess., 21-22, this can be read as a general reference to differences under the Bankruptcy Act between, e.g., straight bankruptcy under Chapter VII, §§ 61-72 (former 11 U.S.C. §§ 101-112), and the re-

only appellate decision with respect to the power of a reorganization court to deal with the problem of asbestos-related cases. As long as the court of appeals' decision in these cases stands, the Amatex, Manville and UNR reorganization courts will, at best, be laboring under a presumption that they are powerless to deal with the central issues in their respective reorganizations.

3. Until corrected, the decision of the court of appeals will impermissibly bias many reorganizations in favor of straight liquidations, thus destroying NOL values and leaving latent future asbestos-related claimants with *no* entity available to satisfy their claims. If a reorganization court is powerless to protect the reorganized corporation from large and uncertain future toxic tort claims, a "nuts and bolts" asset sale may be the only alternative. The decision of the court of appeals was unnecessary to protect the interests of the plaintiffs in these rail reorganization cases and will prejudice the interest of asbestos-related claimants in non-rail reorganizations.

a. This Court has repeatedly made clear that the duty of a trustee in bankruptcy is to "maximize the value of the estate." *Commodity Futures Trading Comm'n v. Weintraub*, _____ U.S. _____, 105 S.Ct. 1986, 1993 (1985). *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 584 (1935). Consistent with these teachings of this Court, the reorganization courts in the Rail Act cases recognized the large values inhering in the continued corporate existence of the debtor railroads. In particular, many of the railroads in reorganization possessed

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organization "chapters" such as Chapter X, §§ 101-276 (former 11 U.S.C. §§ 501-676), and Chapter XI, §§ 301-399 (former 11 U.S.C. §§ 701-799). In any case, the outer reach of the definitions of "claims" and "creditors" for bankruptcy purposes has doubtless been set by the "sweeping, all-inclusive" definitions employed by Congress in § 77(b) of the Bankruptcy Act. *Gardner*, 329 U.S. at 573.

large net operating loss (NOL) tax loss carry-forwards, which had the potential to become a valuable asset of the reorganized corporation by sheltering post-reorganization operating profits of newly-acquired businesses. As early as 1973, the NOL's in bankruptcy of Penn Central Transportation Company had reached "approximately $851 million," *Blanchette v. Connecticut General Insurance Corps.* 419 U.S. 102, 124 (1974), and by 1975 had reached "$1.8 billion," *In re Penn Central Transportation Co.*, 596 F.2d 1127, 1138 (3d Cir. 1979). These NOL's constituted the second largest asset of Reading's estate at the date of consummation, after its claim for the value of the property transferred to Conrail. The reorganization court was fully aware of "the debtor's huge tax-loss carry-forwards." *In re Penn Central Transportation Co.*, 458 F. Supp. 1364, 1374 (E.D. Pa. 1978), *aff'd in part, remanded in part*, 596 F.2d 1102 (3rd Cir. 1979).

These huge NOL's were valuable in reorganization because they could be retained by the reorganized corporation, with equity in the reorganized corporation reflecting their value being distributed to creditors of the debtor to satisfy their claims. To protect the value of Reading's NOL's, and out of concern that the distribution of large amounts of equity in a new corporation to the creditors of the old corporation would result in the characterization of the new corporation as not a continuation of the debtor corporation for purposes of the NOL carryforward (see 26 U.S.C. §§381-383 (Carryovers) and regulations thereunder) and for the "purposes of convenience, simplicity and economy", the Reading Plan provided that the remaining unliquidated assets of the debtor be conveyed en bloc to the "Reorganized Company." The CNJ Plan also provided for transfer of the debtor's remaining assets en bloc to CJI and the distribution of securities of the reorganized company. In this manner,

the reorganization courts carried out their duty to maximize the values available for creditors.

b. The alternative to the procedure actually used would be a sale of the individual assets of the debtor's estate on a "nuts and bolts" basis as opposed to an "en bloc" or going concern basis. A "nuts and bolts" sale of assets would decrease the value of the debtor's estate, as described in section a., *supra*, and otherwise, and would essentially preclude future tort claimants from the opportunity to satisfy their claims. Such a sale would not result in any successor to the business of the debtor, which might be liable under the principles of successor business liability. *Cf. Knapp v. North American Rockwell Corp.*, 506 F.2d 361 (3d Cir.) *cert. denied*, 421 U.S. 965 (1975). The district court in *In re UNR Industries, Inc.*, 29 Bankr. at 744, 748 recognized that the effect of a limitation on the power of the reorganization court such as that imposed by the court of appeals in this case, will be that "debtors will have no choice but to liquidate" and that the latent future toxic tort claimants "may wind up with judgments against corporations left with only one asset: a corporate charter."

c. The decision of the court of appeals was unnecessary to protect the interests of the plaintiffs in these rail reorganization cases and will prejudice the interests of asbestos-related claimants in non-rail reorganizations. In these rail reorganization cases, under established principles of successor liability, Conrail is liable to the plaintiffs. In the case of the Erie-Lackawanna, for example, the debtor is being entirely liquidated and will disappear completely. See *Erie Lackawanna* (App. *infra*, 63a) ("It is not inconceivable and perhaps more probable that the Debtor as reorganized may cease to exist in the not too distant future."). Congress could hardly have intended to exempt Conrail from the normal rules of successor

liability and thus leave former Erie-Lackawanna rail employees with a claim only against an empty shell. In the rail industry generally, the future costs of past occupational exposure to asbestos will be paid by the carriers and passed on to future users of rail service.[5]

Claimants in non-rail reorganizations will not have the same opportunity. As set forth in section 2., *supra*, the decision of the court of appeals, unless corrected, will have substantial precedential influence upon other pending non-rail reorganization proceedings. If liquidation is ordered - or if it occurs post-consummation before the latent asbestos-related injuries manifest themselves - there

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[5] In the court of appeals, Conrail argued that various issues directly or collaterally affecting it are within the exclusive jurisdiction of the Special Court under the Rail Act. Conrail's assertion of exclusive Special Court jurisdiction confuses transactional issues with status issues. At most, the Special Court may have exclusive jurisdiction to interpret the effect of Section 709(b) of the Rail Act, 45 U.S.C. § 797h(b), on the documentation associated with the transactions represented by the April 1, 1976 asset transfers to Conrail ordered by the Special Court, e.g. whether any "claims arising prior to the date of conveyance," against the debtor estates attached to Conrail. (In these cases, of course, Conrail argues that any liability to the plaintiffs did not exist in 1976, but arose later when the plaintiffs' alleged illnesses became manifest.) Assuming, *arguendo*, that the Special Court were to hold that under Section 709(b) no such liability was assumed, all that would be accomplished, as in *Knapp*, 506 F.2d at 361-73, would be a determination that the parties to the transactions did not intend a transfer of liability for future torts based on past conduct. But in *Knapp* liability was nevertheless found based on the status of the defendants as the current operators of the line of business which caused the injury. Under Section 301(b) of the Rail Act, 45 U.S.C. § 741(b), Conrail has the status of the Pennsylvania business corporation which it is, engaged in interstate rail operations, and there is no suggestion anywhere that the Special Court has exclusive jurisdiction over matters arising from Conrail's status as a business corporation operating a railroad. Otherwise these present FELA cases and related cases, and similar cases in the future would themselves be caught up in the Special Court's putative exclusive jurisdiction.

will be no successor or other entity against which the claimants may prosecute their claims.

4. The decision of the court of appeals, by undermining the principle of finality in bankruptcy, discourages the development of compromise settlements and is contrary to the justifiable reliance of the creditors who voted for the Reading and CNJ plans of reorganization.

a. One of the duties of a reorganization court is to promote compromise of claims so that interminable litigation may be ended. *Gardner*, 329 U.S. at 581. A trustee can fashion, and a reorganization court can approve, a plan of reorganization only if a termination of all liabilities of the debtor may be safely assumed by all parties since creditors will compromise claims and accept securities of the reorganized company only if they know that "the plan was final . . ." *Duryee v Erie Railroad Co.*, 175 F.2d 58, 63 (6th Cir.), *cert. denied*, 338 U.S. 861 (1949). Both Judge Ditter in the Reading cases (App. *infra*, 19a-26a) and Chief Judge Fisher in the CJI cases (App. *infra*, 38a-44a) expressly adverted to and relied upon these considerations in reaching the decisions reversed by the court of appeals. Most recently, Circuit Judge Krupansky in the Erie Lackawanna proceedings relied on "the finality historically accorded consummated reorganization plans and final discharge orders" in holding that a discharge under Section 77 absolutely bars post discharge claims, including those of the type involved in these cases. *Erie Lackawanna* (App. *infra*, 66a). Each of the three district courts that participated firsthand as reorganization court judges in the "[a]rduous, exhaustive and comprehensive negotiations and compromise" necessary to formulating a fair and equitable plan of reorganization, when faced with the questions presented here, have chosen not to "forever [destroy] the full faith and credit of the [Bankruptcy] Act by decimat-

ing the incentive of certainty and finality upon which debtors, their creditors and security holders of necessity [rely]." *Id.* (App. *infra*, at 63a, 68a).

b. The decision of the court of appeals destroys the justifiable reliance of all the creditors of Reading and CNJ - both large and small (including personal injury claimants) - in accepting the plans of reorganization. In accepting the plans and in accepting securities in the reorganized company, these creditors believed that the value of the securities would not be impaired by requiring the reorganized company to pay post-consummation claims. At an earlier point, in reviewing the Penn Central plan of reorganization, the court of appeals stressed the importance of the "complex series of compromises affecting the rights of numerous classes of claimants with various priorities of claims" to the success of the reorganization, and held that further delay would "place an even more crushing burden on the parties to this litigation." *In re Penn Central Transportation Co.*, 596 F.2d at 1141. But the validity of that decision has been impaired by this decision of the court of appeals since the "complex series of compromises" in order to achieve finality may be rendered nugatory by allowing these massive and uncertain claims to erode the value of securities accepted by the creditors.

This danger is especially acute as to petitioners. As both reorganization courts recognized, there is no provision in the capital structure of either petitioner for the large, uncertain and protracted toxic tort liabilities implicit in the approach dictated by the court of appeals. Unless rectified, the decision of the court of appeals will destroy the legitimate expectations of the participants in the Rail Act reorganization proceedings and will cripple prospects for negotiated settlements in pending and future railroad and corporate reorganizations.

SUGGESTION FOR REMAND

As an alternative to plenary consideration of these cases, but with a view to the elimination of the precedential effect of the decision below of the court of appeals, the Court may wish to grant the petition in the exercise of its supervisory powers and remand with instructions to vacate the judgment of the court of appeals and remand the Reading cases to the district court for consideration of a motion for summary judgment (which Reading Company here represents that it will promptly file and prosecute) on the ground that Reading Company, as a non-carrier, is not a proper party defendant in these FELA actions. The court of appeals has held that the FELA actions involved in these cases "arose" at a time when Reading Company was a non-carrier and another carrier (Conrail) had succeeded to the rail operations of the former debtor by reason of court-ordered transfers on April 1, 1976 of its rail properties and personnel under the Rail Act. Remand is necessary because the individual plaintiffs have each alleged that the reorganized Reading Company was a carrier at the time of manifestation of symptoms, although in all cases the earliest manifestation times alleged are subsequent to the April, 1, 1976 conveyances to Conrail. *See Railway Labor Executives Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982) (Carrier in liquidation arguably has no remaining common carrier responsibilities).

In view of the different procedural posture of the CJI cases, CJI could not move for summary judgment in its reorganization court. This Court, however, may wish to remand the CJI cases and direct the reorganization court to modify its injunctions to permit the filing of motions for summary judgment on the same grounds as Reading (which motions CJI here represents that it will promptly file and prosecute).

Petitioners have not previously asserted such a defense because prior to the decision of the court of appeals in these cases it had been petitioners' position that the FELA and related causes of action relate back to the time of exposure, i.e., to a period during which the debtor or its predecessor was an operating carrier. A decision holding that an FELA action cannot be maintained against a non-carrier in this particular situation (where Conrail is present as the solvent operator of the continuing business of the common carrier) would moot the reorganization issues decided by the court of appeals in these cases.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN H. LEWIS, JR.*
WILLIAM E. ZEITER
WILLIAM H. CLARK
JOHN F. STILLMUN, III
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000

Of Counsel:
MORGAN, LEWIS
& BOCKIUS

JOHN W. MORRIS
Pierson & Morris, P.C.
Suite 1100
1411 Walnut Street
Philadelphia, PA 19102

Attorneys for Petitioner
Reading Company

STANLEY WEISS*
DEAN R. MAY
744 Broad Street
Newark, NJ 07102
(201) 622-7711

Of Counsel:
CARPENTER, BENNETT
& MORRISSEY

Attorneys for Petitioner
Central Jersey Industries, Inc.

*Counsel of record

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1086

SCHWEITZER, JOSEPHINE,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND
THE READING COMPANY

(Civil No. 81-5375, E. D. of Pa.)

No. 84-1087

SEIBERT, MILDRED, Individually and as Executrix of the Estate of Seibert, Paul D., Deceased,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
THE READING COMPANY

(Civil No. 81-5376, E. D. of Pa.)

No. 84-1088

WENTZEL, GEORGE A.,
Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND
THE READING COMPANY

(Civil No. 82-1683, E. D. of Pa.)

No. 84-1089

ELAINE SCHWAMBACH, Executrix of the Estate of Woodrow W. Schwambach and Merlin Schwambach, Executor of that Estate,

Appellants

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND
THE READING COMPANY

(Civil No. 82-2467, E. D. of Pa.)

No. 84-1108

FRANK, MARILYN L., as Executrix of the Estate of Russell C. Wennell, deceased,

Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND
THE READING COMPANY

(Civil Action No. 82-2999, E. D. of Pa.)

No. 84-1132

SCHOLL, MARTIN H., Individually and as Executor of the Estate of Ethel M. Scholl, deceased,

Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND
THE READING COMPANY

(Civil Action No. 84-1685, E. D. of Pa.)

Nos. 84-1203 and 84-1204

FENSTERMACHER, EARL R., and SCHOLING, CARL,

v.

CONSOLIDATED RAIL CORPORATION, a corporation, and THE READING COMPANY, a corporation

v.

ANCHOR PACKING COMPANY, CELOTEX CORPORATION, successor-in-interest to Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company and/or Panacon Corporation, CERTAINTEED CORPORATION, DUROX EQUIPMENT COMPANY, GARLOCK, INC., JANOS INDUSTRIAL INSULATION CORPORATION, JOHN CRANE-HOUDAILLE, INC., J. V. ROBERTS LTD., KEENE CORPORATION, NICOLET, INC., NOSROC CORPORATION, successor-in-interest to G. & W. H. Corson, Inc. and Calcite Quarry Corporation, STUDEBAKER-WORTHINGTON, INC., TANNETICS, INC., TURNER & NEWALL PLC, TURNER ASBESTOS FIBERS LTD., UNION RUBBER, INC. and VELLUMOID COMPANY

Third Party Defendants

EAGLE PICHER INDUSTRIES, INC. and FLINTKOTE COMPANY

Fenstermacher, Earl R.,
Appellant in No. 84-1203
(D. C. Civil No. 82-4923)

Scholing, Carl,
Appellant in No. 84-1204
(D. C. Civil No. 82-1684)

(Civil Nos. 82-4923 and 82-1684, E. D. of Pa.)

Nos. 84-1116, 84-1117, 84-1118,
84-1119, 84-1120, 84-1121

JOSEPHINE SCHWEITZER,

MILDRED SEIBERT, INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE OF
PAUL D. SEIBERT, DECEASED

GEORGE A. WENTZEL
ELAINE SCHWAMBACH,
EXECUTRIX OF THE ESTATE OF
WOODROW W. SCHWAMBACH
AND MERLIN SCHWAMBACH,
EXECUTOR OF THAT ESTATE

MARILYN L. FRANK,
AS EXECUTRIX OF THE ESTATE OF
RUSSELL C. WENNELL, DECEASED

MARTIN H. SCHOLL, INDIVIDUALLY AND
AS EXECUTOR OF THE ESTATE OF
ETHEL M. SCHOLL, DECEASED

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND THE READING COMPANY

CONSOLIDATED RAIL CORPORATION, Appellant

(Civil Nos. 81-5375, 81-5376, 82-1683, 82-2467,
82-2999, 82-1685) E. D. of Pa.

Nos. 84-1160 and 84-1194

EARL R. FENSTERMACHER and CARL SCHOLING

v.

CONSOLIDATED RAIL CORPORATION, a corporation, and THE READING COMPANY, a corporation

v.

ANCHOR PACKING COMPANY, CELOTEX CORPORATION, successor-in-interest to Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company and/or Panacon Corporation, CERTAINTEED CORPORATION, DUROX EQUIPMENT COMPANY, GARLOCK, INC., JANOS INDUSTRIAL INSULATION CORPORATION, JOHN CRANE-HOUDAILLE, INC., J. W. ROBERTS LTD., KEENE CORPORATION, NICOLET, INC., NOSROC CORPORATION, successor-in-interest to G. & W. H. Corson, Inc. and Calcite Quarry Corporation, STUDEBAKER-WORTHINGTON, INC., TANNETICS, INC., TURNER & NEWALL PLC, TURNER ASBESTOS FIBERS LTD., UNION RUBBER, INC. and VELLUMOID COMPANY,

Third Party Defendants

EAGLE PICHER INDUSTRIES, INC. and FLINTKOTE COMPANY

Consolidated Rail Corporation, Appellant

(Civil Nos. 82-4923 and 82-1684 - E. D. Pa.)

On Appeals from the United States District Court for the Eastern District of Pennsylvania

Nos. 84-5293 & 84-5310

In The Matter of:

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,

Debtor

Consolidated Rail Corporation,

Intervenor

Andrew Thomas and Trudell Thomas, his wife,

Appellants

Andrew Thomas and Trudell Thomas, Appellants in No. 84-5293

Intervenor Consolidated Rail Corporation,

Appellant in No. 84-5310

(B-67-401 - Dist. of N.J. - Newark)

On Appeal from the United States District Court for the District of New Jersey - Newark

No. 84-5451

In the Matter of:

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,

Debtor

Consolidated Rail Corporation,

Intervenor*

Joseph Pongrac, Sr., Robert A. Bingle, Alexander Redelico and Evelyn Redelico, h/w, Joseph C. Popadick and Elma Popadick, h/w, Edward Witos and Philomena Witos, h/w, Mark Gammel, Harry Guralchuk, Steve Palichak, Joseph M. Pinto, Frank Pongrac, Jr., John Sowizral, Harry Wilson, George J. Zeblisky, Robert J. F. Brobyn, Richard Middleton and any and all persons acting on their behalf, Appellants

(B-67-401 - Dist. of N.J. - Newark)

On Appeal from the United States District Court for the District of New Jersey - Newark

Argued: December 13, 1984

Before: SEITZ, GARTH, and HIGGINBOTHAM, Circuit Judges.

(Opinion Filed: March 29, 1985)

* Our reading of the record indicates that Consolidated Rail Corporation is not a party in No. 84-5451.

OPINION OF THE COURT

SEITZ, Circuit Judge.

These appeals, in the various procedural postures set forth in Part I, *infra*, call upon us to interpret § 77 of the Bankruptcy Act of 1898 ("section 77"), as amended, formerly codified at 11 U.S.C. § 205 (repealed 1978). Among the questions presented is whether a plaintiff in an asbestos-related personal injury action who had no manifest injury prior to the consummation date of his employer's reorganization in bankruptcy had a dischargeable "claim" within the meaning of section 77.

I.

Former railroad workers, representatives and survivors brought tort actions against The Reading Company ("Reading") and other defendants in the United States District Court for the Eastern District of Pennsylvania pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.* (1982) ("F.E.L.A."). Subject matter jurisdiction existed pursuant to 28 U.S.C. § 1331 (1982) and 45 U.S.C. § 56 (1982).

Reading filed motions in each action to dismiss it as a party. These motions were opposed by plaintiffs and Consolidated Rail Corporation ("Conrail"), co-defendant in each of these actions. The motions were granted, express determinations were made that there was no just reason for delay, and, pursuant to Fed. R. Civ. P. 54(b), final judgments were entered in favor of Reading in each action. Plaintiffs and Conrail filed timely notices of appeal. This court has jurisdiction to review the judgments pursuant to 28 U.S.C. § 1291 (1982).

In addition, tort actions were brought in federal court against Central Jersey Industries, Inc. ("CJI") by former employees of Central Railroad Company of New Jersey ("CNJ") and their spouses pursuant to F.E.L.A. One similar action was brought in a New Jersey state

court. In response to these actions, CJI filed two separate petitions for relief in the United States District Court for the District of New Jersey. That court had presided over CNJ's reorganization under section 77. The district court had retained jurisdiction to consider such petitions in accordance with its equitable power "to secure or preserve the fruits and advantages of a judgment or decree entered therein." *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934). In one petition, CJI sought a declaration that the state court action was barred. It also sought an injunction seeking: (1) to restrain plaintiffs from prosecuting that action against CNJ, CJI, and Robert D. Timpany and (2) to require plaintiffs to dismiss as to those defendants. The second petition requested similar relief with respect to the federal court actions and, in addition, sought to restrain other former employees from commencing actions.

Conrail sought intervention to oppose the petition seeking relief against the state court plaintiffs, and the district court permitted intervention. The court then granted both of CJI's petitions and entered judgments to that effect. Timely notices of appeal were filed and this court granted a motion to stay the district court's injunction insofar as it enjoined the commencement of new actions and insofar as it ordered that the existing actions in federal court be dismissed. Appellate jurisdiction exists to review these judgments pursuant to 28 U.S.C. § 1291 (1982). *See Ex Parte Tiffany*, 252 U.S. 32 (1920).

II.

Reading and CNJ operated railroads before they reorganized in bankruptcy and divested themselves of their rail assets. Reading filed its bankruptcy petition on November 23, 1971, and transferred all of its rail assets to Conrail on April 1, 1976. The consummation date of

Reading's reorganization was December 31, 1980. CNJ filed its petition on March 12, 1967, transferred its rail assets on April 1, 1976, and the consummation date of its reorganization was September 14, 1979. Robert D. Timpany was the trustee of CNJ's assets during its reorganization. CJI is the company that resulted from that reorganization.

Subsequent to the consummation dates, a number of actions were brought against Reading, CNJ, CJI, and Timpany ("defendants"), alleging personal injury to former employees of Reading and CNJ as a result of exposure to asbestos in the course of their work for the railroads. Plaintiffs in those actions include former railroad employees, representatives, survivors, and spouses ("plaintiffs"). Plaintiffs allege that the asbestos-related injuries did not become manifest until after the relevant consummation dates. It is undisputed that, at this stage in the proceedings, plaintiffs' allegations must be accepted as true.

Defendants argued that plaintiffs' claims were discharged in the bankruptcy proceedings. Plaintiffs and Conrail argued, however, that these claims were not discharged. Further, they argued that those claims did not arise until after the consummation dates and that section 77 does not provide for discharge of such claims. They also argued that if section 77 did provide for discharge in these circumstances, it would violate due process. The district courts determined that plaintiffs' claims were properly discharged, and plaintiffs and Conrail appealed.

III.

Section 77(b) in pertinent part provides that a plan of reorganization "shall include provisions modifying or altering the rights of creditors." "Creditors" include "all holders of claims of whatever character against the debtor

or its property, whether or not such claims would otherwise constitute provable claims under this [Act]." "Claims" include "debts, whether liquidated or unliquidated . . ., or other interests of whatever character." 11 U.S.C. §205(b) (repealed 1978).

Section 77(f) provides that confirmation of the reorganization plan is binding upon "all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." Moreover, if the plan so provides,

> [t]he property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities.

11 U.S.C. §205(f) (repealed 1978).

The quoted statutory language clearly provides broad authorization for the discharge in bankruptcy of claims against the debtor in order to secure a fresh start for a company resulting from a section 77 reorganization. It is equally clear that plaintiffs' rights only could have been affected by the discharge of all "claims" against their employer if they had "claims" within the meaning of section 77 prior to the consummation date of their employer's reorganization.

The district courts in these cases were presented with the difficult question of whether plaintiffs, who allege that they were exposed to asbestos prior to their employer's reorganization and did not manifest any injury until after the relevant consummation dates, had "claims" that were discharged in the reorganization proceedings. The courts concluded in the affirmative, necessarily relying for this conclusion on the determination that plain-

tiffs did have dischargeable "claims" within the meaning of section 77. We shall now consider whether this determination was error.

The starting point for our analysis is the rule that a bankruptcy claim must be based on state or federal law that, "wholly apart from bankruptcy," creates substantive obligations. *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 170 (Frankfurter, J., concurring). *See Tate v. National Acceptance Company (In re* Leeds Homes, Inc.), 332 F.2d 648, 649-50 (6th Cir. 1964), *cert. denied*, 379 U.S. 836 (1964). Since plaintiffs' personal injury actions arise under F.E.L.A., any "claim" plaintiffs may have had prior to the consummation dates would have been based on the federal tort law provided pursuant to that statute.

It is undisputed that a cause of action in tort is a "claim" pursuant to section 77 so that if plaintiffs had causes of action that existed under F.E.L.A. prior to the relevant consummation dates they had "claims." Thus, taking as true plaintiffs' allegations that injury did not manifest until after the consummation dates, we must initially consider whether plaintiffs' F.E.L.A. claims existed before those dates.

Plaintiffs suggest that the United States Supreme Court's decision in *Urie v. Thompson*, 337 U.S. 163 (1949) mandates the conclusion that these actions did not exist until injury became manifest. *Urie* held that, for statute of limitations purposes, a F.E.L.A. action for personal injury resulting from the inhalation of silica dust accrues when silica-related injury manifests itself. Defendants do not agree that *Urie* controls. Assuming that the *Urie* rule is applicable to injury resulting from the inhalation of asbestos fibers, they argue that a cause of action may "exist" before it has "accrued" for statute of limitations purposes. *See In re UNR Industries, Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984), *dismissing appeal from*, 29 Bankr. 741 (N.D.Ill. 1983) (dicta suggesting that certain

asbestos-related causes of action may "exist" before they "accrue").

We assume, without deciding, that under certain circumstances a cause of action may withstand a motion to dismiss for failure to state a claim though the action has not "accrued" within the meaning of the relevant statute of limitations and, thus, a cause of action may "exist" before it has "accrued." Nevertheless, there is generally no cause of action in tort until a plaintiff has suffered identifiable, compensable injury. A leading treatise on tort law explains:

> Actual loss or damage resulting to the interests of another [is a necessary element of a negligence cause of action] . . . The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.

Prosser and Keeton on Torts (5th Ed. 1984) at 165 (footnotes omitted).

It is true that the possible existence of subclinical asbestos-related injury prior to manifestation may be of interest to a histologist. *See Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1218 (6th Cir. 1980), *clarified* 657 F.2d 814 (1981), *cert. denied*, 454 U.S. 1109 (1981). Likewise, the existence of such injury may be of vital concern to insurers and their insureds who have bargained for liability coverage triggered by "bodily injury." *See id.* We believe, however, that subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law.

Moreover, we are persuaded that a contrary rule would be undesirable as applied in the asbestos-related tort context. If mere exposure to asbestos were sufficient to

give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered. Therefore we hold that, as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury.

Still, it has been held that, under certain circumstances, a person may hold a "contingent" claim and thereby be a "creditor" within the meaning of the bankruptcy act, even though he presently has no cause of action against the debtor. *See In re Radio-Keith-Orpheum Corporation*, 106 F.2d 22, 26-27 (2d Cir. 1939) (applying §77B of the Bankruptcy Act, formerly codified at 11 U.S.C. §207 (repealed in 1978)). This proposition follows from the broad language of section 77(b) which provides that "claims" include "interests of whatever character."

In *Radio-Keith-Orpheum*, landlords had leased property to one of the debtor's subsidiaries on guaranties by the debtor that the rent would be paid. The landlords argued that, because there had been no default under the leases, the guaranties should be unaffected by the bankruptcy proceedings. The Second Circuit rejected this argument. Applying a definition of "creditor" that, for present purposes, is virtually identical to the one found in section 77, the court treated the landlords as creditors. It held that they "were not as a matter of law entitled to stand aloof and obtain a continuance of the guaranties unaffected by the reorganization, the equivalent of a preference for them over unsecured creditors with accrued or determinable claims. What they were

entitled to was treatment as nearly like that accorded to ordinary unsecured creditors as the circumstances permitted. . . ." *Id.*

The reasoning in *Radio-Keith-Orpheum* is not controlling here, however, because we do not believe plaintiffs had "interests" of any character before injury manifested itself. In our view, before one can have an "interest" which is cognizable as a contingent claim under section 77, one must have a legal relationship relevant to the purported interest from which that interest may flow. *Cf. Avellino & Bienes v. M. Frenville Co., Inc. (In re* M. Frenville Co., Inc.), 744 F.2d 332 (3d Cir. 1984) (no contingent claim pursuant to 11 U.S.C. §101(4) (1982) unless a "right to payment" or a "right to an equitable remedy" exists).

In *Radio-Keith-Orpheum*, although there had been no breach of the lease agreement and thus there was no present cause of action pursuant to the guaranties, there was a guarantor-guarantee legal relationship from which an interest in the guaranty could flow. There is no legal relationship, however, between a tortfeasor and a tort victim until a tort actually has occurred. The tortfeasor-victim legal relationship arises simultaneously with the cause of action in tort. Since we have said that there is no tort under F.E.L.A. until injury manifests itself, it follows that there was no legal relationship between plaintiffs and defendants relevant to plaintiff's future causes of action in tort from which an "interest" could flow.

A number of factors lend support to this analysis. First, defendants have not cited a single opinion, other than those of the district courts in these cases, holding that a tort cause of action as yet nonexistent under applicable tort law is a contingent claim within the meaning of any section of the Bankruptcy Act or Bankruptcy Code. Second, the fairness rationale in *Radio-Keith-Orpheum* is inapplicable in the tort context. One who con-

tracts with a debtor prior to reorganization bargains for a legal relationship with that debtor, relying on the debtor's pre-reorganization solvency. We agree that such a person should not be "entitled to stand aloof" and avoid the consequences of the bankruptcy proceedings. *Id.* In contrast, a tort plaintiff cannot in any reasonable way be said to have bargained for his cause of action.

Third, a construction of "interest" that would include the future possibility of a tort cause of action against a debtor with whom the future victim has no legal relationship relevant to the purported "interest" would lead to results that we cannot believe were intended by Congress. Reading's treatment in its brief of *Mooney Aircraft Corp. v. Foster (In re* Mooney Aircraft, Inc.), 730 F.2d 367, 375 (5th Cir. 1984) illustrates this point.

The *Mooney* court, interpreting Chapter VII of the Bankruptcy Act of 1898, formerly codified at 11 U.S.C. §101 *et seq.* (repealed 1978), held that persons killed in an airplane crash five years after the close of the airplane manufacturer's bankruptcy proceedings did not have dischargeable "claims" against the debtor in the prior proceedings. Reading argues in its brief that the broad definition of "claims" in section 77, including "interests of whatever character," would mandate a contrary result under the *Mooney* facts. Thus, in Reading's view, a person who had no inkling that years in the future he would be killed by a product produced by the debtor would be required to file a claim in the debtor's section 77 bankruptcy proceedings so as to preserve any rights that he might have in a future tort suit. One court has already described such a procedure as "absurd." *Gladding Corp. v. Forbes (In re* Gladding Corp.), 20 Bankr. 566, 568 (D. Mass. 1982). We agree. It would be nearly as absurd under our facts to have expected plaintiffs, who allegedly had manifested no injury at the time of the reorganization proceedings, to file claims for such injury in those proceedings.

Finally, an interpretation of "interests" that included plaintiffs' future tort actions would raise constitutional questions. For example, the general rule is that all known creditors must receive personal notice. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-20 (1950). This requirement has proven to be manageable where creditors have a present legal relationship with the debtor, such as in the *Radio-Keith-Orpheum* case. But if contingent claims were held to include possible future tort claims, then every hypothetical chain of future events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim. The holder of any such "claim" whose whereabouts were known would then seem to be a "known creditor." Thus, in our case, every employee who had worked near asbestos and whose address was known would be a known creditor; yet none received personal notice in the prior reorganization proceedings. We believe that our interpretation, which avoids such thorny Constitutional issues, is the proper view of Congressional intent.

We conclude, therefore, the plaintiffs' future F.E.L.A. causes of action were not dischargeable claims under section 77, and that the district courts erred in determining otherwise.[1] Our disposition of this issue makes it unnecessary for us to reach plaintiffs' alternative arguments.

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[1] Thus, we reject the argument made by Reading and CJI that the plaintiffs had claims that were discharged by the express terms of their respective plans. Because this case does not present the question of what provision in a reorganization plan, if any, could be made for future claims such as these (*e.g.*, reserve or sinking funds, insurance, annuities, etc.) we do not address that issue here.

IV.

CJI and Reading have presented additional contentions to this court. CJI contends that the plaintiffs in the state court action and intervenor Conrail in that action are collaterally estopped from arguing that their rights against it were not discharged. Reading contends that plaintiffs' causes of action cannot be asserted against the reorganized Reading Company because plaintiffs' alleged injuries were caused by a wholly different entity: the former Reading Company. The legal basis for Reading's argument is not clear. On the one hand, Reading appears to argue that, as a matter of bankruptcy law, a section 77 reorganization proceeding necessarily results in an entity that is wholly distinct from the debtor. On the other hand, Reading's argument may be that, pursuant to the corporate law under which Reading is organized, it cannot be held liable for plaintiff's claims because it is neither the same entity as the former Reading Company nor a successor corporation.

We do not address these arguments on the merits because they have not yet been considered by the district courts. Nor for the same reason do we consider any possible recovery against Mr. Timpany, as Trustee. The defendants will be afforded an opportunity to make their arguments before those courts on remand.

The judgments of the district courts will be reversed and the cases remanded for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY SCHWEITZER	:	
v.	:	CIVIL ACTION No. 81-5375
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
MILDRED SEIBERT, Individually and as Executrix of the estate of PAUL D. SEIBERT, Deceased	:	
v.	:	CIVIL ACTION No. 81-5376
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
GEORGE A. WENTZEL	:	
v.	:	CIVIL ACTION No. 82-1683
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
CARL SCHOLING	:	
v.	:	CIVIL ACTION No. 82-1684
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
MARTIN H. SCHOLL, Individually and as Executor of the estate of ETHEL M. SCHOLL, Deceased	:	
v.	:	CIVIL ACTION No. 82-1685
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

WOODROW W. SCHWAMBACK	:	
v.	:	CIVIL ACTION No. 82-2467
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
MARILYN L. FRANK, Executrix of the estate of RUSSELL C. WENNELL, Deceased	:	
v.	:	CIVIL ACTION No. 82-2999
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
EARL R. FENSTERMACHER	:	
v.	:	CIVIL ACTION No. 82-4923
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

OPINION

DITTER, J. January 10, 1984

On November 23, 1971, the Reading Company filed for reorganization under section 77 of the former Bankruptcy Act, 11 U.S.C. §205. In the ensuing nine years, considerable efforts were made by the court, the debtor's trustees, and other inter-ested parties in an attempt to develop a plan of reorganization that was equitable to the debtor's creditors and stockholders. This objective was ultimately reached, and on December 23, 1980, I entered Order No. 2004 which consummated the plan of reorgani-zation. Included within this consummation order was the following provision relating to the discharge and release of claims:

> Section 3.03: Subject to the provisions of Section 6.02 below relating to the payment, assumption or satisfaction by the Reorganized Company of certain claims, the Debtor and the Reading Trustees shall, as

of the Consummation Date, be discharged and released forever from:

> (a) all obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings, and whether or not provable in bankruptcy, including without limitation taxes in respect of non-bankrupt leased lines and other subsidiaries which are being satisfied pursuant to the Plan and all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor; . . .[1]

Subsequent to the consummation date, December 31, 1980, several former employees of Reading brought actions against it and Consolidated Rail Corporation pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §1 *et seq.*, seeking to recover for asbestos-related injuries resulting from their employment with the defendants. Presently before me are the motions to dismiss of the Reading Company on the ground that section 3.03 of the consummation order bars plaintiffs' rights to maintain their actions, even though the injuries for which compensation is sought did not become manifest until after the reorganization proceedings had been completed.[2] While the resolution of this question is difficult, the motions to dismiss must be granted.

The purpose of efforts under section 77 of the former Bankruptcy Act, 11 U.S.C. §205, is the reorganization

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[1] Section 6.02, entitled "Assumed Obligations" does not pertain to the type of claims that are asserted here. Instead, this section refers to claims "timely filed" against the debtor which the reorganized company is responsible for. Those claims that are not timely-filed are discharged by operation of Section 3.03.

[2] In section 7.03 of the consummation order, I reserved jurisdiction, *inter alia*, to consider any proof of claim against the debtor. Because of this reservation of jurisdiction, these actions have been temporarily assigned to me in order to resolve the motions to dismiss.

of the debtor railroad "by a readjustment of its financial structure in the interest of the debtor and its creditors and security holders." *Van Schaick v. McCarthy*, 116 F. 2d 987, 992 (10th Cir. 1941). In this regard, one of the goals of the proceedings is the development of a plan of reorganization that is fair and equitable and affords due recognition to the rights of each class of creditors and stockholders. 11 U.S.C. §205(e)(1). In order to achieve a fair and equitable result, the rights of the creditors and stockholders must be altered or modified in such a way that best serves all interested parties. *Id.* at section 205(b); 5 *Collier on Bankruptcy* (14th ed. 1978) §77.13[1]. As in the present case, this often means that creditors will be forced to accept less than 100 per cent of the amount owed to them by the debtor and the stockholders must accept stock in a company whose assets have been diminished by payments made to creditors. Obviously, this effort requires a delicate balancing of the competing interests and a willingness on the part of interested parties to make certain accommodations in order to achieve the desired goal.

Once a plan of reorganization has been developed by the debtor's trustees, it is submitted to the court for its approval. In order for the plan to be approved, the court must be satisfied that it complies with all requirements of law, is feasible, and is fair and equitable. 11 U.S.C. §205(e). I approved the Reading reorganization plan and made the appropriate findings on May 21, 1980. *In re Reading Company*, 24 Bankr. 858 (E.D. Pa. 1980). After the approved plan had been accepted by the appropriate number of creditors and shareholders, I issued an opinion and Order No. 1855 on September 25, 1980, confirming the plan. *See* 11 U.S.C. §205(e). The final step necessary to complete the reorganization was taken on December 23, 1980, when I issued Order No. 2004 which provided for the consummation of the plan on December 31, 1980.

The essence of this consummation order was the dissolution of the debtor company and creation of the reorganized company. Section 2.02 of Order No. 2004 states that "the Reading Trustees shall cause the books and accounts of the Debtor to be closed as of 11:59 P.M., E.S.T., on the Consummation Date. The books and accounts of the Reorganized Company shall be opened as of 12:00 A.M., E.S.T., on the day following the Consummation Date." The corporation that emerged from the reorganization pro-ceedings resembles the old Reading Company in name only. The debtor had already conveyed most of its rail assets to Conrail on April 1, 1976, pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701-94 (Supp. III 1973). The reorganized company that exists today operates as a real estate investment company whose railroad activities are limited to its ownership of certain properties, notably Reading terminal in downtown Philadelphia.

As previously noted, section 3.03 of the consummation order discharges the debtor as of December 31, 1980, from all obligations, debts, liabilities, and claims, whether or not filed or presented. The purpose of this provision is clear: to provide finality to the reorganization proceedings with regard to the claims asserted against the debtor. The court of appeals for the Sixth Circuit aptly summarized the purpose of a substantially similar provision in another section 77 proceeding.

> The provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute . . . courts should relax the provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated. . . . [C]reditors would not participate in reorganizations if they could not feel that the plan was final . . . [I]t would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the

> plan and change the conditions which constituted the basis of its earlier acceptance.

Duryee v. Erie Railroad Company, 175 F. 2d 58, 63 (6th Cir.), *cert. denied*, 338 U.S. 861 (1949). I am in complete accord with this reasoning. Recently, Chief Judge Clarkson S. Fisher of the District of New Jersey echoed a similar rationale in holding that two railroad employees were barred from asserting claims against Central Railroad Company of New Jersey and its reorganized company, Central Jersey Industries, for injuries that had not been discovered at the time of consummation. *In re Central Railroad Company of New Jersey*, No. B 67-401 (D. N.J. July 18, 1983). "Allowance of the claims asserted here and those that would likely follow in the future, would have a substantial impact upon the reorganized company. Furthermore, to permit the estate to be reopened each time a new claim is discovered would preclude any finality to the reorganization proceedings." *Id.* at 7. While it may be harsh to those claimants whose injuries did not become manifest until after the debtor's estate was closed, their claims cannot be heard. This result is inescapable due to the need to be consistent with the expectations of the creditors and stockholders who participated in the reorganization.

I have reached this conclusion with full recognition of the significant factual underpinning of these claims. Evidence has been presented which indicates that officials of the old Reading were aware of the existence of asbestos-related claims prior to the consummation order of December 23, 1980. In a letter of June 5, 1980, to its accountant describing the possible liabilities and future debts of the debtor, Reading's legal counsel stated in part:

> Asbestos fibers were used for some time in the construction and repair of steam boilers by debtor. One suit has been filed for damages resulting from exposure to these fibers and news media publicity has indicated

> that additional claims may be made. Similarly, claims are possible from employees of Debtor who has been exposed to a toxic substance used in insulating material for electric motors which is alleged to be a cause of cancer. No estimate can be made at this time of the extent of possible liability from these two causes.

(Exhibit B of Plaintiffs' Second Memorandum in Opposition to Defendant's Motion to Dismiss.) In addition, on November 6, 1980, the administrative counsel of Reading accompanied officials of the National Institute of Occupational Safety and Health (NIOSH) on a tour of the Reading facilities where the plaintiffs were generally employed. This tour was part of NIOSH investigation of asbestos-related complaints which had been received concerning this job site. Plaintiffs contend that Reading should be held accountable for these claims since its officials knew of their injuries or the possibility of their injuries coming into existence prior to the date of the consummation order. Because of this knowledge, plaintiffs argue that Reading should be estopped from disclaiming liability for asbestos-related injuries.

I disagree. As previously explained, the reorganized company resembles the now-defunct debtor in name only. For all practical purposes, the debtor is a dissolved corporation and the present Reading Company is a separate and distinct entity. As of 11:59 P.M. on December 31, 1980, the debtor ceased to exist. From this time forward, the debtor and the reorganized company were discharged from all past, present, or future claims. Under these circumstances, the reorganized company cannot be responsible for the liabilities of a debtor that is no longer in existence. *See* 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §7327 (perm. ed. 1983). To the extent plaintiffs allege fraud or misrepresentation by officials of the debtor which occurred prior to the reorganization, this alleged wrongful conduct cannot be imputed to the new Reading. *Frey v. Frankel*, 443 F. 2d 1240 (10th Cir. 1971).

For the foregoing reasons, the plaintiffs' claims against both the debtor and the reorganized company must be dismissed.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY SCHWEITZER	:	
v.	:	CIVIL ACTION No. 81-5375
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
MILDRED SEIBERT, Individually and as Executrix of the Estate of PAUL D. SEIBERT, Deceased	:	
v.	:	CIVIL ACTION No. 81-5376
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
GEORGE A. WENTZEL	:	
v.	:	CIVIL ACTION No. 82-1683
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
CARL SCHOLING	:	
v.	:	CIVIL ACTION No. 82-1684
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
MARTIN H. SCHOLL, Individually and as Executor of the Estate of ETHEL M. SCHOLL, Deceased	:	
v.	:	CIVIL ACTION No. 82-1685
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
WOODROW W. SCHWAMBACK	:	
v.	:	CIVIL ACTION No. 82-2467
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

MARILYN L. FRANK, Executrix of the Estate of RUSSELL C. WENNELL, Deceased	:	
v.	:	CIVIL ACTION No. 82-2999
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
EARL R. FENSTERMACHER	:	
v.	:	CIVIL ACTION No. 82-4923
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

ORDER

AND NOW, this 10th day of January, 1984, for the reasons expressed in the foregoing opinion, the motions to dismiss of the Reading Company are hereby granted.

BY THE COURT

/s/ J. WILLIAM DITTER JR.
J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARL SCHOLING,	:	
	:	CIVIL ACTION
v.	:	No. 82-1684
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

ORDER

TROUTMAN, S.J.

AND NOW, this 29th day of March, 1984, upon consideration of the pending motions of plaintiff and defendant Consolidated Rail Corporation, and upon a finding that the above captioned case involves multiple parties, and having determined that the order of the Honorable J. William Ditter, Jr., entered January 11, 1984, granting the motions of The Reading Company to dismiss was a final decision as to the rights and liabilities of The Reading Company and that there is no just reason for delay, IT IS ORDERED that judgment is hereby entered in favor of defendant The Reading Company and against the plaintiff and defendant Consolidated Rail Corporation.

IT IS FURTHER ORDERED that this judgment is entered pursuant to F.R.C.P. 54(b).

/s/ E. MAC TROUTMAN

S.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EARL R. FENSTERMACHER, Plaintiff,	:	
v.	:	CIVIL ACTION No. 82-4923
CONSOLIDATED RAIL CORPORATION	:	
v.	:	
ANCHOR PACKING COMPANY, et al., Defendants.	:	

ORDER

NOW, this thirteenth day of March, 1984, upon consideration of the January 10, 1984 Order of Judge J. William Ditter, Jr., granting the motion of The Reading Company to dismiss the complaint against it and Judge Ditter's opinion of the same date, and because I have determined that there is no just reason for delay of the entry of final judgment and that this judgment is ripe for review,

IT IS ORDERED that judgment is entered in favor of defendant The Reading Company and against the plaintiff pursuant to Rule 54(b) of the Federal Rules of Civil Procedure;

IT IS FURTHER ORDERED that the proceedings in this matter shall be suspended pending final determination on appeal of the Order entered herein.

BY THE COURT:

/s/ EDWARD N. CAHN

Edward N. Cahn J.

IN THE UNITED STATES DISTRICT COURT
FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

MILDRED SEIBERT, et al.	:	
v.	:	CIVIL ACTION NO. 81-5376
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
GEORGE A. WENTZEL	:	
v.	:	CIVIL ACTION NO. 82-1683
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

O R D E R

AND NOW, this 26th day of January, 1984, IT IS ORDERED that the order entered on January 10, 1984, by The Honorable J. William Ditter, Jr., dismissing The Reading Company as a defendant in the within actions shall be deemed to be a final order in accordance with Fed. R. Civ. Pro. 54(b).

BY THE COURT:

/s/ EDWARD N. CAHN

Edward N. Cahn J.

IN THE UNITED STATES DISTRICT COURT
FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

MILDRED SEIBERT, et al., Plaintiff,	:	
v.	:	CIVIL ACTION NO. 81-5376
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY, Defendants.	:	

ORDER

AND NOW, this thirteenth day of March, 1984, upon consideration of the January 10, 1984 Order of Judge J. William Ditter, Jr., granting the motion of The Reading Company to dismiss the complaint against it and Judge Ditter's opinion of the same date, and because I have determined that there is no just reason for delay of the entry of final judgment and that this judgment is ripe for review,

IT IS ORDERED that judgment is entered in favor of defendant The Reading Company and against the plaintiff pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

BY THE COURT:

/s/ EDWARD N. CAHN

Edward N. Cahn J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE A. WENTZEL, Plaintiff,	:	
v.	:	CIVIL ACTION NO. 82-1683
CONSOLIDATED RAIL CORPORATION	:	
and	:	
THE READING COMPANY, Defendants.	:	

ORDER

AND NOW, this thirteenth day of March, 1984, upon consideration of the January 10, 1984 Order of Judge J. William Ditter, Jr., granting the motion of The Reading Company to dismiss the complaint against it and Judge Ditter's opinion of the same date, and because I have determined that there is no just reason for delay of the entry of final judgment and that this judgment is ripe for review,

IT IS ORDERED that judgment is entered in favor of defendant The Reading Company and against the plaintiff and against the defendant Consolidated Rail Corporation on its cross claim against The Reading Company pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

BY THE COURT:

/s/ EDWARD N. CAHN

Edward N. Cahn J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN H. SCHOLL, Individually and as Executor of the Estate of ETHEL M. SCHOLL, Deceased	:	
v.	:	CIVIL ACTION NO. 82-1685
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

ORDER

NOW, February 9, 1984, upon consideration of the January 10, 1984 order of Judge J. William Ditter, Jr., granting the motion of The Reading Company to dismiss the complaint against it and Judge Ditter's opinion of the same date, and because I have determined that there is no just reason for delay of the entry of final judgment and that this judgment is ripe for review, IT IS ORDERED THAT JUDGMENT IS ENTERED IN FAVOR OF DEFENDANT THE READING COMPANY AND AGAINST THE PLAINTIFF AND AGAINST THE THIRD-PARTY PLAINTIFF CONSOLIDATED RAIL CORPORATION PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

/s/ DANIEL H. HUYETT, 3RD
Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARILYN L. FRANK, Executrix of the Estate of Russell C. Wennell, deceased	:	
v.	:	CIVIL ACTION NO. 82-2999
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

ORDER

TROUTMAN, S.J.

AND NOW, this 3rd day of February, 1984, upon consideration of the pending motions of plaintiff and defendant Consolidated Rail Corporation, and upon a finding that the above captioned case involves multiple parties; that the order of the Honorable J. William Ditter, Jr. entered January 11, 1984, granting the motions of The Reading Company to dismiss was a final decision as to the rights and liabilities of The Reading Company; that there is no just reason for delay, IT IS ORDERED that judgment is hereby entered in favor of defendant The Reading Company and against the plaintiff and defendant Consolidated Rail Corporation.

IT IS FURTHER ORDERED that this judgment is entered pursuant to F.R.C.P. 54(b).

/s/ E. MAC TROUTMAN

S.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY SCHWEITZER	:	
v.	:	CIVIL ACTION NO. 81-5375
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

ORDER

TROUTMAN, S.J.

AND NOW, this 3rd day of February, 1984, upon consideration of the pending motions of plaintiff and defendant Consolidated Rail Corporation, and upon a finding that the above captioned case involves multiple parties; that the order of the Honorable J. William Ditter, Jr., entered January 11, 1984, granting the motions of The Reading Company to dismiss was a final decision as to the rights and liabilities of The Reading Company; that there is no just reason for delay, IT IS ORDERED that judgment is hereby entered in favor of defendant The Reading Company and against the plaintiff and defendant Consolidated Rail Corporation.

IT IS FURTHER ORDERED that this Judgment is entered pursuant to F.R.C.P. 54(b).

/s/ E. MAC TROUTMAN
S.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WOODROW W. SCHWAMBACH	:	
	:	CIVIL ACTION
v.	:	NO. 82-2467
CONRAIL	:	

ORDER

NOW, January 27, 1984, upon consideration of the January 10, 1984 order of Judge J. William Ditter, Jr., granting the motion of The Reading Company to dismiss the complaint against it and Judge Ditter's opinion of the same date, and because I have determined that there is no just reason for delay of the entry of final judgment and that this judgment is ripe for review, IT IS ORDERED THAT JUDGMENT SHALL BE ENTERED IN FAVOR OF DEFENDANT THE READING COMPANY AND AGAINST THE PLAINTIFF AND AGAINST THE THIRD-PARTY PLAINTIFF CONSOLIDATED RAIL CORPORATION PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE. MY ORDER OF JANUARY 18, 1984 IS VACATED.

/s/ DANIEL H. HUYETT, 3rd

Daniel H. Huyett, 3rd, Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ACTION NO. B 67-401

In the Matter of	:	
THE CENTRAL RAILROAD	:	OPINION
COMPANY OF NEW JERSEY	:	

FISHER, Chief Judge.

On March 22, 1967, the Central Railroad Company of New Jersey ("CNJ") filed for reorganization under §77 of the former Bankruptcy Act. Thereafter it operated under federal trusteeship until consummation of its plan of reorganization on September 14, 1979. On April 1, 1976, Consolidated Rail Corporation ("Conrail") acquired virtually all of the CNJ rail system pursuant to the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §701 *et seq.* Robert D. Timpany ("Timpany") served as trustee from early 1971 until consummation.

Order No. 965, "Order in Aid of Consummation of the Amended Plan of Reorganization of the Central Railroad Company of New Jersey," was filed on September 13, 1979. It discharged the debtor and the trustee from:

> all obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor . . .

except to the extent provided by the reorganization plan. It provided for the transfer to the reorganized company of all of the assets and property of the estate of the debtor:

> free and clear of all claims, rights, demands, interests, liens and encumbrances of every kind and char-

acter, whether or not properly or timely filed and whether or not approved, acknowledged or allowed in these proceedings, of the Debtor, its creditors, claimants and stockholders . . .

It also provided that:

All persons, firms, governmental entities and corporations, wherever situated, located or domiciled, are hereby *permanently* restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue any suits or proceedings, except such suits or proceedings as may be for the purpose of carrying out this Order or Order 964 or consummating the Plan, at law or in equity or otherwise, against the Reorganized Company or its successors or assigns or against any of the assets or property of the Reorganized Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claim or interest of any kind or nature whatsoever which any person, firm, governmental entity or corporation may have in, to or against the Debtor, the Trustee of the property of the Debtor or any of his assets or properties, and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing, any portion of the property, real, personal, or mixed, of any kind or character, on or at any time after the Consummation Date in the possession of the Reorganized Company and from interfering with or taking steps to interfere with the Reorganized Company, its officers and agents, or the operation of the properties or the conduct of the business of the Reorganized Company, by reason of or on account of any obligation or obligations incurred by the Debtor or any of its Trustees in these pro-ceedings, except the obligations imposed on the Reorganized Company by the Plan and this Order. All persons, firms, govern-

> mental entities and corporations, wherever situated, located or domiciled, are hereby restrained and enjoined from instituting, prosecuting or pursuing or attempting to institute, prosecute or pursue any suit or proceedings, at law or in equity or otherwise, against the Debtor or any of its assets or property, directly or indirectly. (emphasis supplied).

The Court retained jurisdiction to consider and take appropriate action with respect to the foregoing provision and to take such action and enter such orders as might be necessary to carry out the plan of reorganization, the order in aid of consummation, and all other orders relative thereto. The estate was closed effective as of the consummation date.

On July 29, 1982, Frank Wooten ("Wooten") filed a complaint in the Superior Court of New Jersey, pursuant to the Federal Employer's Liability Act, against CNJ, Timpany, Conrail, and Central Jersey Industries Inc. ("CJI"), the reorganized company seeking recovery for alleged injuries and diseases contracted during his employment by CNJ and Timpany. On December 29, 1982, a similar action was commenced in the Superior Court of New Jersey by Raymond Mansfield ("Mansfield"), the Estate of Raymond Mansfield, and Mary Mansfield.[1] The plaintiffs in these cases have alleged that their claims did not arise until after the date of the consummation order because they did not discover their injuries until after that date.[2]

[1] This action also names as defendants several shipyards that had employed Mansfield and several manufacturers of cigarettes smoked by him.

[2] While the Mansfield complaint contains an allegation as to the date of discovery, the Wooten complaint does not. The only such allegation is in Wooten's brief. For purposes of the present action, I will assume the accuracy of his allegations.

CJI moved in state court to dismiss the Wooten complaint for lack of subject matter jurisdiction but its motion was denied. At the same time, Wooten moved before this Court to reopen Order No. 965 to permit him to proceed against CJI. That motion was later withdrawn. CJI now petitions this Court, on behalf of itself, CNJ, and Timpany, for an order (1) declaring that the claims against them by the state court plaintiffs arising out of the employment of Wooten and Mansfield by CNJ and Timpany are discharged; (2) permanently enjoining plaintiffs from prosecuting their state court actions with respect to CNJ, Timpany, and CJI; and (3) adjudging plaintiffs in contempt of Order No. 965 unless they dismiss their actions as to CNJ, Timpany, and CJI within ten (10) days.

The question raised by the instant matter is whether this Court's order discharging the debtor and the trustee and enjoining any suits against the reorganized company based upon claims against the debtor and the trustee, can act to bar claims for injuries that had not yet been discovered at the time of consummation. That question must be answered in the affirmative.

The authority for the Court's order is found in §77 of the former Bankruptcy Act dealing with the reorganization of railroads in interstate commerce. This statute provides, *inter alia*, that upon confirmation, a plan of reorganization shall be binding upon all creditors whether or not their claims shall have been filed; that the property dealt with by the plan be transferred free and clear of all claims of creditors; that the debtor be discharged from its debts and liabilities; and that upon termination of the proceedings a final decree shall be entered discharging the trustee, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Former 11 U.S.C. §205(f). The term "creditors" includes "all holders of claims of whatever character against the debtor or its property whether or not such claims would

otherwise constitute provable claims under [the former Bankruptcy] Act. . . ." Former 11 U.S.C. §205(b). The term "claims" is defined very broadly and includes "debts, whether liquidated or unliquidated, securities. . ., liens, or other interests of whatever character," *Id.*, and "all claims of whatever character against the debtor ... whether ... fixed or contingent," former Bankruptcy Rule 8-701(g).

Section 77 "reflects a public policy that the operation of railroads as sound economic units should be achieved for the benefit of the public regardless of the interest of creditors and stockholders.... To this end, any reorganization plan ... should be drastic enough to assure the continued solvency of the enterprise...." 5 Collier on Bankruptcy (14th Ed.) § 77.02[1]. The broad scope of the statute's definitions facilitates this policy and must be held to encompass the claims presented by these state court plaintiffs.

The main purpose of §77 is the rehabilitation of the debtor railroad rather than the liquidation of its assets. *Connecticut Ry. and Lighting Co. v. Palmer*, 305 U.S. 493, 501 (1939); *Van Schaick v. McCarthy*, 116 F.2d 987, 992-93 (10th Cir. 1941); *In Re Penn Central Transportation Co.*, 458 F. Supp. 1234, 1246 (E.D. Pa. 1978). The real worth of a railroad, both monetarily and with respect to the public interest, lies in its value as a going concern. The value of its assets, if sold piecemeal, would be negligible. Congress regarded reorganization as the most feasible solution for a railroad that became insolvent or unable to meet its debts as they matured. *Van Schaick, supra* at 992; see also, *In Re Penn Central, supra* at 1246.

A plan of reorganization must design a capital structure such that the fixed charges are brought within the probable future earnings of the reorganized company. *Van Schaick, supra* at 992; *In Re Penn Central, supra* at 1247. In order for this to be accomplished, there must

be a determination, prior to consummation, of the assets and liabilities of the estate and of the obligations and burdens that the reorganized company will be expected to bear. In the present case, the capital structure of CJI was based upon certain assumptions as to what burdens it could reasonably bear. Interests in the company and certain of its assets were distributed accordingly. The original capitalization of CJI, the allocation of its securities, and the public trading in those securities have all reflected the outcome of the reorganization proceedings, including the termination of liabilities not taken into account prior to the closing of the estate. Allowance of the claims asserted here and those that would likely follow in the future, would have a substantial impact upon the reorganized company. Furthermore, to permit the estate to be reopened each time a new claim is discovered would preclude any finality to the reorganization proceeding.

The purpose of the reorganization provisions could not be realized if the discharge of the debtor were not complete and absolute. If third parties could not rely on the finality of the plan of reorganization, they would be reluctant to invest or deal with the reorganized company. *See Duryee v. Erie R. Co.*, 175 F.2d 58, 63 (6th Cir.), *cert. denied*, 338 U.S. 861 (1949).

For the above reasons, I hold that Order No. 965 discharged CNJ and Timpany from the claims presented by the Wooten and Mansfield plaintiffs. It also bars those plaintiffs from proceeding against CJI based upon claims against CNJ and Timpany.

It is well settled that a court of bankruptcy may enjoin prosecution of an action in state court in order to enforce or protect its decree. *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934); *Evans v. Dearborn Machinery Movers Co.*, 200 F.2d 125 (6th Cir. 1953); *Mar-Tex Realization Corp. v. Wolfson*, 145 F.2d 360 (2d Cir. 1944). I therefore grant CJI's petition for declaratory and injunctive relief. At-

torney for CJI shall submit an appropriate order within five (5) days.

/s/ CLARKSON S. FISHER

Clarkson S. Fisher, Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of	:	In Proceedings for the Reorganization of a Railroad
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor.	:	Hon. Clarkson S. Fisher
	:	No. B 401-67 ORDER NO. 978

ORDER DETERMINING STATUS OF CLAIMS AND ENJOINING PROSECUTION THEREOF

Central Jersey Industries, Inc., the reorganized Central Railroad Company of New Jersey, having filed a Petition for declaratory and injunctive relief with respect to certain claims being asserted by former employees of the Central Railroad Company of New Jersey, and the matter having come on for a hearing on May 23, 1983, which was duly noticed, and the Court having considered the Petition, the briefs and argument of counsel in support and opposition thereto and all parties in interest having been heard or given the opportunity to be heard, and good cause appearing;

NOW, THEREFORE, it is on this 26th day of July, 1983

ORDERED that any and all claims of Frank M. Wooten (Wooten) against the Central Railroad Company of New Jersey (CNJ), R.D. Timpany (Timpany), former Trustee of the Central Railroad Company of New Jersey arising out of his employment by CNJ or Timpany and any and all claims of Wooten against Central Jersey Industries, Inc. (CJI) based upon any claim against CNJ or Timpany be and hereby are declared to be discharged and barred pursuant to the provisions of Order 965 of this Court; and be it

FURTHER ORDERED that Frank M. Wooten and any and all persons acting on his behalf be and hereby are restrained and enjoined from prosecuting the case of *Wooten v. The Central Railroad Company of New Jersey, et al.*, Docket Number L67140-81 in the Superior Court of New Jersey, Essex County, Law Division with respect to defendants CNJ, Timpany and CJI to the extent such action against CJI is based upon claims against CNJ or Timpany; and be it

FURTHER ORDERED that Frank M. Wooten is directed to dismiss such action as to CNJ, Timpany and any claims therein against CJI based upon claims against CNJ and Timpany; and be it

FURTHER ORDERED that any and all claims of Raymond Mansfield, the Estate of Raymond Mansfield and Mary Mansfield (the Mansfield plaintiffs) against Central Railroad Company of New Jersey, R.D. Timpany, former Trustee of the Central Railroad Company of New Jersey, arising out of the employment of Raymond Mansfield by CNJ or Timpany and any and all claims of the Mansfield plaintiffs against Central Jersey Industries, Inc. based upon any claim against CNJ or Timpany be and hereby are declared to be discharged and barred pursuant to the provisions of ORDER 965 of this Court; and it is

FURTHER ORDERED that Raymond Mansfield, the Estate of Raymond Mansfield and Mary Mansfield and any and all persons acting on their behalf be and hereby are restrained and enjoined from prosecuting the case of *Raymond Mansfield, et al. v. Central Railroad Company of New Jersey, et al.*, Docket Number L000493-83 in the Superior Court of New Jersey, Ocean County, Law Division with respect to defendants CNJ, Timpany and CJI to the extent such action against CJI is based upon a claim against CNJ or Timpany; and be it

FURTHER ORDERED that the Mansfield plaintiffs are directed to dismiss said action as to CNJ, Timpany and any claims therein against CJI based upon claims against CNJ and Timpany.

/s/ CLARKSON S. FISHER

Clarkson S. Fisher
C.J.U.S.D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of	:	In Proceedings for the Reorganization of a Railroad
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor.	:	Hon. Clarkson S. Fisher
	:	No. B 67-401 ORDER NO. 981

ORDER DETERMINING STATUS OF CLAIMS AND ENJOINING PROSECUTION THEREOF

Central Jersey Industries, Inc., the reorganized Central Railroad Company of New Jersey, having filed a Petition for declaratory and injunctive relief with respect to certain claims being asserted by a former employee of the Central Railroad Company of New Jersey, and Consolidated Rail Corporation having filed a motion to intervene and the matter having come on for a hearing on April 9, 1984, which was duly noticed, and the Court having considered the Petition, the motion, the briefs, the certification and arguments of counsel in support and opposition hereto and all parties in interest having been heard or given the opportunity to be heard, and good cause appearing;

NOW, THEREFORE, it is on this 16th day of April, 1984;

ORDERED, that any and all claims of Andrew Thomas and Trudell Thomas, his wife against the Central Railroad Company of New Jersey (CNJ), R.D. Timpany (Timpany), former Trustee of the Central Railroad Company of New Jersey, arising out of his employment by CNJ or Timpany and any and all claims of the Thomas plaintiffs against Central Jersey Industries, Inc. (CJI) based upon any claim against CNJ or Timpany be and

hereby are declared to be discharged and barred pursuant to the provisions of Order 965 of this Court; and be it

FURTHER ORDERED that Andrew Thomas and Trudell Thomas, his wife, and any and all persons acting on their behalf be and hereby are restrained and enjoined from prosecuting the case of *Thomas v. Central Railroad of New Jersey, et al.*, Docket No. L-038433-83 in the Superior Court of New Jersey, Essex County, Law Division with respect to defendants CNJ, Timpany and CJI to the extent such action against CJI is based upon claims against CNJ or Timpany; and be it

FURTHER ORDERED that unless Andrew Thomas and Trudell Thomas, his wife, and George M. Kachmar III dismiss such action as to CNJ, Timpany and any claims therein against CJI based upon claims against CNJ and Timpany within 10 days of the date of this Order said persons shall be adjudged to be in contempt of Order 965 of this Court; and be it

FURTHER ORDERED that the motion of Consolidated Rail Corporation to intervene in the within matter be and hereby is granted.

/s/ CLARKSON S. FISHER

Clarkson S. Fisher
C.J.U.S.D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of	:	In Proceedings for the Reorganization of a Railroad
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor.	:	Hon. Clarkson S. Fisher
	:	No. B 67-401 ORDER NO.

ORDER DETERMINING STATUS OF CLAIMS AND ENJOINING PROSECUTION THEREOF

Central Jersey Industries, Inc., the reorganized Central Railroad Company of New Jersey, having filed a Petition for declaratory and injunctive relief with respect to certain claims being asserted by former employees of the Central Railroad Company of New Jersey, and the matter having come on for a hearing on May 29, 1984, which was duly noticed, and the Court having considered the Petition, the motion, the briefs, the certification and arguments of counsel in support and opposition thereto and all parties in interest having been heard or given the opportunity to be heard, and good cause appearing;

NOW, THEREFORE, it is on this 18th day of June, 1984;

ORDERED that any and all claims of Joseph Pongrac, Sr., Robert A. Bingle, Alexander Redelico and Evelyn Redelico, his wife, Joseph C. Popadick and Elna Popadick, his wife, and Edward Witos and Philomena Witos, his wife, against the Central Railroad Company of New Jersey (CNJ), R.D. Timpany (Timpany), former Trustee of the Central Railroad Company of New Jersey, arising out of their employment by CNJ or Timpany and any and all claims of the *Pongrac, Bingle, Redelico, Popad-*

ick, and *Witos* plaintiffs against Central Jersey Industries, Inc. (CJI) based upon any claim against CNJ or Timpany be and hereby are declared to be discharged and barred pursuant to the provisions of Order 965 of this Court; and be it

FURTHER ORDERED that Mark Gammel, Harry Guralchuk, Steve Palichak, Joseph M. Pinto, Frank Pongrac, Jr., John Sowizral, Harry Wilson, George J. Zeblisky and any and all persons acting on their behalf be and hereby are permanently restrained and enjoined from commencing any action against CNJ or Timpany based upon any claim arising out of their employment by CNJ or Timpany or against CJI based upon any claim against CNJ or Timpany; and be it

FURTHER ORDERED that Francis Pongrac, Sr., Robert A. Bingle, Alexander Redelico and Evelyn J. Redelico, his wife, Joseph C. Popadick and Elna Popadick, his wife, and Edward Witos and Philomena Witos, his wife, and any and all persons acting on their behalf be and hereby are restrained and enjoined from prosecuting the actions of *Pongrac v. Central Railroad Company of New Jersey, et al.*, Civil Action No. 84-1404, *Bingle v. Central Railroad Company of New Jersey, et al.*, Civil Action No. 84-1399, *Redelico v. Central Railroad Company of New Jersey, et al.*, Civil Action No. 84-1402, *Popadick v. Central Jersey Industries, Inc., et al.*, Civil Action No. 84-1761, and *Witos v. Central Jersey Industries, Inc., et al.*, Civil Action No. 84-1762 in the United States District Court for the Eastern District of Pennsylvania with respect to defendants CNJ, Timpany and CJI to the extent such action against CJI is based upon claims against CNJ or Timpany; and be it

FURTHER ORDERED, that unless Joseph Pongrac, Sr., Robert A. Bingle, Alexander Redelico and Evelyn J. Redelico, his wife, Joseph C. Popadick and Elna Popadick, his wife, Edward Witos and Philomena Witos, his wife, Robert J.F. Brobyn, Esq. and Richard H. Mid-

dleton, Jr., Esq. dismiss such action as to CNJ, Timpany and any claims therein against CJI based upon claims against CNJ and Timpany within 10 days of the date of this Order said persons shall be adjudged to be in contempt of Order 965 of this Court.

/s/ CLARKSON S. FISHER

Clarkson S. Fisher
C.J.U.S.D.C.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1086

SCHWEITZER, JOSEPHINE,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
and
THE READING COMPANY

(Civil No. 81-5375, E. D. of Pa.)

No. 84-1087

SEIBERT, MILDRED, Individually and as Executrix of the Estate of Seibert, Paul D., Deceased,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
THE READING COMPANY

(Civil No. 81-5376, E. D. of Pa.)

No. 84-1088

WENTZEL, GEORGE A.,
Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
and
THE READING COMPANY

(Civil No. 82-1683, E. D. of Pa.)

No. 84-1089

ELAINE SCHWAMBACH, Executrix of the Estate of Woodrow W. Schwambach and MERLIN SCHWAMBACH, Executor of that Estate,

Appellants

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
and
THE READING COMPANY

(Civil No. 82-2467, E. D. of Pa.)

No. 84-1108

FRANK, MARILYN L., as Executrix of the Estate of Russell C. Wennell, deceased,

Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
and
THE READING COMPANY

(Civil Action No. 82-2999, E. D. of Pa.)

No. 84-1132

SCHOLL, MARTIN H., Individually and as Executor of the Estate of Ethel M. Scholl, deceased,

Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
and
THE READING COMPANY

(Civil Action No. 84-1685, E. D. of Pa.)

Nos. 84-1203 and 84-1204

FENSTERMACHER, EARL R., and SCHOLING, CARL,

v.

CONSOLIDATED RAIL CORPORATION, a corporation, and THE READING COMPANY, a corporation

v.

ANCHOR PACKING COMPANY, CELOTEX CORPORATION, successor-in-interest to Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company and/or Panacon Corporation, CERTAINTEED CORPORATION, DUROX EQUIPMENT COMPANY, GARLOCK, INC., JANOS INDUSTRIAL INSULATION CORPORATION, JOHN CRANE-HOUDAILLE, INC., J. W. ROBERTS LTD., KEENE CORPORATION, NICOLET, INC., NOSROC CORPORATION, successor-in-interest to G. & W. H. Corson, Inc. and Calcite Quarry Corporation, STUDEBAKER-WORTHINGTON, INC., TANNETICS, INC., TURNER & NEWALL PLC, TURNER ASBESTOS FIBERS LTD., UNION RUBBER, INC. and VELLUMOID COMPANY

Third Party Defendants

EAGLE PICHER INDUSTRIES, INC. and FLINTKOTE COMPANY

FENSTERMACHER, EARL R.
Appellant in No. 84-1203
(D. C. Civil No. 82-4923)

SCHOLING, CARL,
Appellant in No. 84-1204
(D. C. Civil No. 82-1684)

(Civil Nos. 82-4923 and 82-1684, E. D. of Pa.)

Nos. 84-1116, 84-1117, 84-1118, 84-1119, 84-1120, 84-1121

JOSEPHINE SCHWEITZER,

MILDRED SEIBERT, Individually and as Executrix of the Estate of Paul D. Seibert, Deceased

GEORGE A. WENTZEL

ELAINE SCHWAMBACH, Executrix of the Estate of Woodrow W. Schwambach and MERLIN SCHWAMBACH, Executor of that Estate

MARILYN L. FRANK, as Executrix of the Estate of Russell C. Wennell, Deceased

MARTIN H. SCHOLL, Individually and as Executor of the Estate of Ethel M. Scholl, Deceased

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL) and THE READING COMPANY
CONSOLIDATED RAIL CORPORATION, Appellant

(Civil Nos. 81-5375, 81-5376, 82-1683, 82-2467, 82-2999, 82-1685) E. D. of Pa.

Nos. 84-1160 and 84-1194

EARL R. FENSTERMACHER and CARL SCHOLING

v.

CONSOLIDATED RAIL CORPORATION, a corporation, and THE READING COMPANY, a corporation

v.

ANCHOR PACKING COMPANY, CELOTEX CORPORATION, successor-in-interest to Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company and/or Panacon Corporation,

CERTAINTEED CORPORATION, DUROX EQUIPMENT COMPANY, GARLOCK, INC., JANOS INDUSTRIAL INSULATION CORPORATION, JOHN CRANE-HOUDAILLE, INC., J.W. ROBERTS LTD., KEENE CORPORATION, NICOLET, INC., NOSROC CORPORATION, successor-in-interest to G. & W. H. Corson, Inc., and Calcite Quarry Corporation, STUDEBAKER-WORTHINGTON, INC., TANNETICS, INC., TURNER & NEWALL PLC, TURNER ASBESTOS FIBERS LTD., UNION RUBBER, INC. and VELLUMOID COMPANY,
Third-Party Defendants

EAGLE PICHER INDUSTRIES, INC.
and FLINTKOTE COMPANY

CONSOLIDATED RAIL CORPORATION, Appellant

(Civil Nos. 82-4923 and 82-1684 – E.D. Pa.)

On Appeals from the United States District Court for the Eastern District of Pennsylvania

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Nos. 84-5293 & 84-5310

In the Matter of:

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Debtor

CONSOLIDATED RAIL CORPORATION,
Intervenor

ANDREW THOMAS and TRUDELL THOMAS, his wife,
Appellants

ANDREW THOMAS and TRUDELL THOMAS, Appellants in No. 84-5293

INTERVENOR CONSOLIDATED RAIL CORPORATION,
Appellant in No. 84-5310

(B-67-401-Dist. of N.J. – Newark)

On Appeal from the United States District Court for the District of New Jersey — Newark

No. 84-5451

In the Matter of:

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Debtor

CONSOLIDATED RAIL CORPORATION,
Intervenor

Joseph Pongrac, Sr., Robert A. Bingle, Alexander Redelico and Evelyn Redelico, h/w, Joseph C. Popadick and Elma Popadick, h/w, Edward Witos and Philomena Witos, h/w, Mark Gammel, Harry Guralchuk, Steve Palichak, Joseph M. Pinto, Frank Pongrac, Jr., John Sowizral, Harry Wilson, George J. Zeblisky, Robert J.F. Brobyn, Richard Middleton and any and all persons acting on their behalf,
Appellants

(B-67-401-Dist. of N. J. – Newark)

On Appeal from the United States District Court for the District of New Jersey – Newark

Present: SEITZ, GARTH and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

These causes came to be heard on the records from the United States District Courts for the Eastern District of Pennsylvania and the District of New Jersey and were argued by counsel December 13, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Courts entered in:

Eastern District of Pennsylvania Docket No. 81-5375 on January 25, 1984 and

February 8, 1984 and appealed at Docket Nos. 84-1086 and 84-1116;

Eastern District of Pennsylvania Docket No. 82-5376 on January 27, 1984 and appealed at Docket Nos. 84-1087 and 84-1117;

Eastern District of Pennsylvania Docket No. 82-1683 on January 27, 1984 and appealed at Docket Nos. 84-1088 and 84-1118;

Eastern District of Pennsylvania Docket No. 82-2467 on January 30, 1984 and appealed at Docket Nos. 84-1089 and 84-1119;

Eastern District of Pennsylvania Docket No. 82-2999 on February 8, 1984 and appealed at Docket Nos. 84-1108 and 84-1120;

Eastern District of Pennsylvania Docket No. 82-1685 on February 9, 1984 and appealed at Docket Nos. 84-1121 and 84-1132;

Eastern District of Pennsylvania Docket No. 82-4923 on March 15, 1984 and appealed at Nos. 84-1160 and 84-1203;

Eastern District of Pennsylvania Docket No. 84-1684 on March 30, 1984 and appealed at Nos. 84-1194 and 84-1204;

District of New Jersey Docket No. B-67-401 on April 16, 1984 and June 19, 1984 and appealed at Nos. 84-5293, 84-5310 and 84-5451, be, and the same are hereby reversed and the causes remanded to the said District Courts for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees.

March 29, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 84-5293, 84-5310 and 84-5451

In the Matter of: THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, ROBERT D. TIMPANY, TRUSTEE, AND CENTRAL JERSEY INDUSTRIES, INC.
Appellees

ANDREW THOMAS AND TRUDELL THOMAS,
Appellants in No. 84-5293

CONSOLIDATED RAIL CORPORATION,
Intervenor-Appellant in No. 84-5310

FRANK PONGRAC, SR., et al.,
Appellants in No. 84-5451

(B-67-401-Dist. of N. J. – Newark)

On Appeal from the United States District Court for the District of New Jersey

SUR PETITION FOR REHEARING

Present: ALIDSERT, *Chief Judge*, and SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*.

The petition for rehearing filed by appellees in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

/s/ COLLINS J. SEITZ

Dated: April 26, 1985 Circuit Judge

APPENDIX E

DOCUMENT NO. 3638

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In the Matter of	:	In Proceedings for
	:	the Reorganization
ERIE LACKAWANNA	:	of a Railroad
RAILWAY CO.	:	
Debtor	:	No. B72-2838

ORDER NO. 1281

As prologue to addressing the issues of moment before the court a brief historical summary of this proceeding is in order.

Section 77 of the Bankruptcy Act (formerly 11 U.S.C. §205)[1] was supplemented in 1973 by the Regional Rail Reorganization Act ("Rail Act") (as amended, 45 U.S.C. §701 *et seq.*) to confront and accommodate the existing crisis of the northeast railroads, including the Debtor.[2]

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[1] On June 4, 1972, Debtor filed for reorganization pursuant to Section 77 of the Bankruptcy Act which was directed exclusively to railroad reorganizations. The current Bankruptcy Code became effective October 1, 1979 and applies only to actions commenced thereafter. To the extent that any case interpreting the Code would articulate a different result than Section 77 with respect to the issues joined herein by the amended pleadings, it should be analyzed in light of the existing differences between the Act and the Code.

[2] For purposes of this opinion, the Erie Lackawanna Railway Company is referred to as, "the Debtor"; Erie Lackawanna, the reorganized company is referred to as "Erie"; Consolidated Rail Corporation is referred to as "Conrail", and the Final Plan of Reorganization is referred to as "the Plan".

The Rail Act was promulgated by Congress to facilitate the reorganization of these railroads into a single viable system to be operated by Conrail. Pursuant to the Rail Act on March 30, 1976, the Debtor ceased all rail operations and shortly thereafter the bulk of its rail properties were conveyed to Conrail, thus concluding the Debtor's tenure as an operating railroad. Subsequent to this conveyance, the Debtor's limited resources precluded its reorganization as an ongoing business entity, and its Plan evolved, pursuant to Section 77, as a "liquidating" plan consistent with §601(b)(4) of the Rail Act, which provided that the bankruptcy court "shall proceed to reorganize or liquidate such railroad in reorganization pursuant to Section 77 on such terms as the court deems just and reasonable, or pursuant to any other provisions of the Bankruptcy Act, if the court finds that such action would be in the best interests of such estate." 45 U.S.C. §791. Accordingly, the Debtor was not restructured as an ongoing operational railroad but emerged as a completely different and distinct entity in the form of a liquidating corporation. It is not inconceivable, and perhaps more probable, that the Debtor as reorganized may cease to exist in the not too distant future.

During the intervening ten-year period between June of 1972 and November of 1982, the parties under the aegis of the reorganization court and pursuant to the mandate of §77 proceeded to readjust the entire financial structure of the Debtor and materially modify and alter the rights of creditors and security holders so as to best serve all interested parties including the Debtor, its creditors and security holders by formulating a plan that was fair and equitable to all classes of creditors. Bankruptcy Act, formerly 11 U.S.C. §205(b); *Van Schaik v. McCarthy*, 116 F.2d 987, 992 (10th Cir. 1941). Arduous, exhaustive and comprehensive negotiations and compromises were rewarded by a court-approved plan of reorganization which was consummated by a final degree of

discharge on November 30, 1982 (Order No. 1235). The Consummation Order declared this court's exclusive jurisdiction over the Debtor and its property and "all claims . . . whether or not properly or timely filed and whether or not approved in these proceedings." *Id.* at 2. Section 3.01 of the Consummation Order, and Section 3.3 of the Plan, directed the transfer of the Debtor's properties to Erie, free and clear of all claims, subject to certain exceptions defined in the Plan. Section 3.04 of the Consummation Order provided, in pertinent part, that

> The Debtor and the Debtor's Trustees shall, as of the Consummation Date, be discharged and released forever from
>
> > (a) All obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor;

Paragraph 3 of the order permanently enjoined all persons and entities from prosecuting any action against Erie on account of any claim against the Debtor, except as permitted in the Plan. Paragraph 4(vi) of the Final Decree reserved to this court's jurisdiction the authority to enforce the injunctive provisions of the final decree.

La Scala v. Consolidated Rail Corporation, et al. (Docket No. 84-1395) and *Henning v. Consolidated Rail Corporation, et al.* (Docket No. 84-1396) were commended in the United States District Court for the Eastern District of Pennsylvania on March 22, 1984, approximately sixteen months after the final consummation date of the Debtor's Plan. It must be noted that during this intervening period and continuing thereafter, Erie stock has been actively traded on the open market. The complaints in both actions are virtually identical and named the same thirty companies as defendants. Apart

from the Debtor, Erie, Conrail and New Jersey Transit Rail Operation (N.J. Transit) (collectively the "Railroad Defendants") the remaining named defendants are asbestos manufacturers, suppliers and installers. La Scala-Henning seek damages against the Railroad Defendants pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51-60, the Federal Safety Appliance Acts, 45 U.S.C. §§ 1-16 and the Boiler Inspection Acts, 45 U.S.C. 22-34. In these negligence actions La Scala-Henning charge that their exposure to products containing asbestos during their railroad employment resulted in the development of serious respiratory disease. They also assert causes of action against the remaining defendants predicated on theories of negligence, strict product liability, breach of warranty, conspiracy, fraudulent concealment and misrepresentation.

On October 26, 1983, the State of New York initiated an action in the New York State Supreme Court, Albany County, against Conrail, alleging that it was strictly liable under Article 12 of the New York Navigation Law for the costs incurred by the State in removing and cleaning up a discharge of a petroleum product from the Hornell Railroad Yard into the Canisteo River. On February 14, Conrail initiated a third-party action (the "environmental action") against Erie as successor corporation of the Debtor for any liability Conrail may incur by virtue of its acquisition of the Hornell Railroad Yard from the Debtor in 1976, and against the City of Hornell Industrial Development Agency for any liability Conrail may incur by virtue of Conrail's sale of the yard to the agency in 1978.

La Scala-Henning urge this reorganization court to reopen its final order dated November 30, 1982, which discharged the Debtor and Erie from all future liability, in order to permit the prosecution of their respective claims against the Debtor and Erie for asbestos-related personal injuries which may have occurred prior to the

final Discharge and Consummation Date of the Plan, but which did not manifest themselves until subsequent thereto. Conrail would also reopen the final bankruptcy discharge order to recover restitution from the Debtor and Erie for property damage which Conrail may have incurred as a result of the environmental action filed by the State of New York.

The issues presently confronting the Court were joined by Erie's petition seeking to declare the final discharge of the Debtor's estate and the final consummation of the Plan a bar against all post discharge claims asserted by La Scala, Henning and Conrail, and to permanently enjoin them from prosecuting their personal injury and/or property claims against the Debtor and Erie.

In effect, the asserted claims challenge the very essence of the Bankruptcy Act by seeking to compromise the finality historically accorded consummated reorganization plans and final discharge orders issued by reorganization and bankruptcy courts.

Stated differently, La Scala-Henning and Conrail seek to pierce the invulnerability of consummated plans of reorganization and/or final discharges in bankruptcy by mandating into perpetuity the right to file claims for post discharge manifested latent injuries allegedly incurred prior to the issuance of such final orders.

At this juncture in the proceedings, it should be noted that although this Court has temporarily enjoined the prosecution of the cases against the discharged Debtor and Erie pending disposition of this controversy, it has not interfered with the rights of La Scala-Henning to pursue their respective personal injury claims against Conrail and/or the manufacturers, distributors and installers of asbestos products which the parties continue to aggressively press. Nor has it interfered with the State of New York from pursuing its property claim against Conrail. Accordingly, the aggrieved parties are

not deprived of alternate sources of recovery for their asserted injuries.

Section 77(b) of the former Bankruptcy Act (formerly 11 U.S.C. §205(b)) provides the point of departure for this court's analysis of the issues here in question. That section reads in part as follows:

> Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, . . . and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have accepted it . . . The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan . . . Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. . . .

The quoted seminal legislative pronouncement explicated the classically accepted purpose of the Bankruptcy Act as the vehicle for providing the discharged Debtor with a fresh start. This articulated Congressional design was succinctly set out by the Court of Appeals for the Sixth Circuit in its frequently cited opinion interpreting the purpose of a substantially similar provision in another Section 77 proceeding:

> The provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute. . . . [If] courts should relax the provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated. . . . [C]reditors would not participate in reorganizations if they could not feel that the plan was final. . . . [I]t would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constituted the basis of its earlier acceptance.

Duryee v. Erie Railroad Company, 175 F.2d 58, 63 (6th Cir.), *cert. denied*, 338 U.S. 861 (1949).

The court's announcement in *Duryee* underscored the fundamental premise that the complete and absolute discharge of the Debtor was the keystone to the credibility of the Bankruptcy Act which prompted the Debtor, its creditors and security holders to accept material and detrimental changes of position to consummate a plan of reorganization. To conclude otherwise would have forever destroyed the full faith and credit of the Act by decimating the incentive of certainty and finality upon which debtors, their creditors and security holders of necessity were required to rely and continue to rely under the new Code.

Indeed, the Supreme Court on numerous occasions has stated that one of the primary purposes of the Bankruptcy Act was to afford debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Perez v. Campbell*, 402 U.S. 637, 648, 91 S. Ct. 1704, 1710-11, 29 L. Ed.2d 233 (1971) (citations omitted). "A salient element in such a reorganization is the discharge of all demands of whatsoever sort, executory and contingent, presently due or to mature in the future." *City Bank Farmers Trust Co. v. Irving Trust Co. et al.*, 299 U.S.

433, 438-39, 57 S. Ct. 292, 295, 81 L. Ed. 324 (1937). In discussing the policy of according the reorganized company a fresh start as against asbestos related tort claims, the Court of Appeals for the Seventh Circuit has posited that "the purpose of allowing contingent claims to be proved and discharged in a reorganization is to make it likelier that the bankrupt firm can emerge from the reorganization with fair prospects of success, unhampered by the overhanging threat of liability for claims that had not been discharged . . ." *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 756 F.2d 508, 523 (7th Cir. 1985) (citations omitted). If a final bankruptcy order were to be reopened to permit claims of the type here asserted, and again reopened each time a new claim is asserted "final decrees and the courts which render them would know no rest, and the policy of the Reorganization Act to launch the reorganized corporation upon a new business life undisturbed and unembarrassed by claims against its predecessor would suffer a serious defeat." *Duryee v. Erie R. Co.*, 91 F. Supp. 1009, 1012 (N.D. Ohio 1950), *aff'd*, 191 F.2d 855 (6th Cir. 1951) (memorandum), *cert. denied*, 342 U.S. 948 (1952).

Section 3.04 of the Consummation Order here in issue, in compliance with the dictates of the Act, provided finality to all past, present and contingent future claims against the Debtor and Erie and discharged them from all debts, obligations, liabilities and claims.

This court is mindful of the recent decision of the United States Court of Appeals for the Third Circuit in *Schweitzer v. Consolidated Rail Corporation (Conrail) and the Reading Company, et al.*, 758 F.2d 936 (3rd Cir. 1985), which reversed two trial court decisions addressing analogous issues as here presented. Prior to examining the logic of the circuit court's reasoning in that decision, this court is prompted to momentarily digress and review the direct and lucid analysis of the trial court

in those proceedings which confronted issues identical to those of the case at bar.

The District Court for the Eastern District of Pennsylvania barred similarly situated parties from reopening confirmed immutable Plans of Reorganization by anchoring its decision upon the essential elements of certainty and finality integral to all discharges in bankruptcy. *Schweitzer v. Consolidated Rail Corp.*, 36 Bankr. 469 (E.D. Pa. 1984), *rev'd*, 758 F.2d 936 (1985). In its disposition, the trial court summarized by favorably quoting from the identical case of *In re Central Railroad Company of New Jersey*, 38 Bankr. 686 (D.N.J. 1983), wherein that court stated:

> Allowance of the claims asserted here and those that would likely follow in the future, would have a substantial impact upon the reorganized company. Furthermore, to permit the estate to be reopened each time a new claim is discovered would preclude any finality to the reorganization proceeding.

In re Central Railroad Company of New Jersey, 38 Bankr. at 689.

The *Schweitzer* trial court thereupon proceeded to reason that:

> While it may be harsh to those claimants whose injuries did not become manifest until after the debtor's estate was closed, their claims cannot be heard. This result is inescapable due to the need to be consistent with the expectations of the creditors and stockholders who participated in the reorganization.

Schweitzer, 36 Bankr. at 472.

Thus the immutable finality accorded discharges in bankruptcy and/or plans of reorganization by both the *Schweitzer* and *Central Railroad Company of New Jersey* (CNJ) trial courts would foreclose all pre and post consummation order claims including contingent or "future" claims of the type advanced by La Scala-Henning and Conrail.

Returning to the assessment of the Third Circuit's opinion in *Schweitzer*, this court's attention is initially directed to the inescapable conclusions conceded by the court:

> Section 77(b) in pertinent part provides that a plan of reorganization "shall include provisions modifying or altering the rights of creditors." "Creditors" include "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this [Act]." "Claims" include "debts, whether liquidated or unliquidated . . . , or other interests of whatever character." 11 U.S.C. §205(b) (repealed 1978).
>
> Section 77(f) provides that confirmation of the reorganization plan is binding upon "all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." Moreover, if the plan so provides,
>
> > [t]he property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities.
>
> 11 U.S.C. §205(f) (repealed 1978).
>
> The quoted statutory language clearly provides broad authorization for the discharge in bankruptcy of claims against the debtor in order to secure a fresh start for a company resulting from a section 77 reorganization. It is equally clear that plaintiffs' rights only could have been affected by the discharge of all "claims" against their employer if they had "claims" within the meaning of section 77 prior to the consummation date of their employer's reorganization.

Schweitzer, 758 F.2d at 941.

Having acknowledged the sweeping scope and inclusiveness of the terms "claim" and "creditor" within the context of Section 77 of the Act, the circuit court proceeded to severely constrict its application of the Act and reasoned that the plaintiffs' FELA causes of action, to come within the orbit of "dischargeable" claims under Section 77, had to exist prior to the relevant consummation date. Although it further acknowledged that under certain circumstances a cause of action could "exist" before it "accrued", it concluded that these FELA plaintiffs had no cause of action prior to final consummation because they did not at that time have compensable injuries pursuant to general principles of tort law. It articulated the above conclusion while recognizing that the term "claim" as defined in Section 77 "included debts, whether liquidated or unliquidated, securities . . . , liens or other interests of whatever chara ter" and that the term "Creditors" included "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act . . ." *Id.*[3]

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[3] It is interesting to note that the definition of "claim," when read together with the definition of "creditor" under Section 77, is identical in substance to the definition of "claim" found in Chapter 10, Section 106(1) (former 11 U.S.C. §506), dealing with corporate reorganizations. The definition in the latter section has been construed as "sweeping in scope":

> Within its purview is any character of a claim against the debtor or its property, whether or not such claim is provable under §63 of the Act, and whether secured or unsecured, liquidated or unliquidated, fixed or contingent. This is, of course, a more inclusive definition than that applicable in ordinary bankruptcy, and it should be given a broad construction with respect to claims and creditors in order to dispose of all liabilities of the debtor in reorganization. *In Re Stirling Homex Corp.*, CCH Bank. Dec. ¶66,850 (2d Cir. 1978), *quoting* 6 Collier on Bankruptcy ¶2.05, at 306 (1978).

It went on to state further that without a legal relationship between tortfeasor and tort victim there could not be any cognizable "interest" under Section 77. Consequently, there could be no legal relationship between Reading and Central Railroad Company of New Jersey (CNJ) and their employees-plaintiffs relevant to the employees' future tort actions from which a Section 77 "interest" could flow.

Thus, by emphasizing the injury element of the FELA tort claims and ignoring the express definitions of "claim" and "creditor", and further by mandating the manifestation of injury as a prerequisite to the existence of a "claim" or "right" cognizable in bankruptcy, the Third Circuit literally read into the Section 77 definitions of "claim" and "creditor" the provability and "right to payment" requirements that had been expressly deleted from those definitions.

The Third Circuit cited to four factors as support for its analyses and conclusions. In discussing factors one and two, it noted that the defendants in *Schweitzer* failed to cite a single opinion, other than the district court opinions in those cases, holding that a tort cause of action as yet nonexistent under applicable tort law is a contingent claim within the meaning of the Bankruptcy Act or Bankruptcy Code. However, the court then attempted to distinguish and discount the Second Circuit decision interpreting Section 77(b) of the Bankruptcy Act in *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22 (2d Cir. 1939), *cert. denied*, 308 U.S. 622 (1940), as not controlling in *Schweitzer*. It stated that in *In re Radio-Keith-Orpheum Corp.*, although there had been no breach of the controversial lease agreement there in issue and thus no existing cause of action pursuant to the guarantees in the lease, there was a guarantor-guarantee legal relationship from which an interest in the guarantee could flow. This was purportedly in contrast to *Schweitzer*, wherein the court concluded the plaintiffs had no "inter-

ests" of any character before injury manifested itself since there was no legal relationship as between the tortfeasor and a tort victim until the tort had actually occurred. The argument, however, ignores the statutory "legal relationship" imposed by the FELA upon former railroad employers to provide their employees with a safe place to work. The analogous legal relationship imposed by the FELA undermines the very foundation of the Third Circuit's statement that in contrast to the private guarantee arrangement in *In re Radio-Keith-Orpheum Corp.* (holding such arrangement created a cognizable "interest" under Section 77 (B)), railroads and their employees had no statutory "legal relationship." Since railroad employees "bargained" for a safe place within which to work free of negligence, and this was guaranteed by the employer, there did in fact exist a legal relationship from which an interest could flow.

Third, the circuit court cited to the congressional intent as support for its conclusions. This court's research has been unable to surface even an inferential indication for the circuit court's statement. The Court's statement addressing congressional intent appears to be sheer conjecture.

Fourth, the circuit court's reliance upon *Mooney Aircraft Corp. v. Foster*, 730 F.2d 367 (5th Cir. 1984) is misplaced. In *Mooney*, wrongful death actions were commenced against the ultimate purchaser of the debtor's assets, some five years after the first transfer of those assets, under a theory of common law successor liability. The Fifth Circuit concluded that absent a "provable" claim by the plaintiff under Section 63 of the Bankruptcy Act, the bankruptcy court was without jurisdiction to enjoin the plaintiffs from pursuing actions against the successor corporation. Since, as previously set forth, the provability requirement of Section 63 of the Act was discarded in Section 77, *Mooney* is not relevant to the analysis of the propriety of permitting La Scala Henning

to pursue claims against Erie. Section 77 does not require a claimant to demonstrate a "right to payment" to support a claim. All that is required is that the claimant have a cognizable interest regardless of whether the underlying claim is contingent or in futuro and regardless of its provability during reorganization.[4]

In contrast to the conclusions in these cases, a number of courts have affirmatively decided that in asbestosis cases future claimants have an "interest" in bankruptcy proceedings of sufficient magnitude to warrant the appointment of a representative to protect their "interests" by the bankruptcy court. In *In re Johns-Manville Corp.*, 36 Bankr. 743, 753, the court, in considering the right of future asbestosis claimants to be declared "parties in interest" so as to permit their participation in ongoing reorganization proceedings stated:

> In the instant case, this comprehensive definition of bodily injury covering mere exposure militates in favor of a declaration that those who have been exposed

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[4] This court does not place the same reliance upon *Avellino & Bienes v. M. Frenville Co., Inc. (In re M. Frenville Co., Inc.)*, 744 F. 2d 332 (3d Cir. 1984), as is accorded that citation by both the Third Circuit in *Schweitzer* and by Conrail in its brief.

Initially it should be noted that *In re M. Frenville Co., Inc.* arose under 11 U.S.C. Section 362(a) of the Bankruptcy Code and not under Section 77 of the Bankruptcy Act. The issue in that case was the application of the automatic stay provision of the Code to pre bankruptcy acts of the debtor wherein the cause of action from those acts accrued post petition. (The proceeding was on-going since no final discharge had issued.) The court was not confronted with dischargeability under Section 77 of the Act as in this case. The pivot of the Court's decision turned on the definition of "claims" under 11 U.S.C. Section 101(4). That definition directs that the claimant have a "right to payment" regardless of whether that claim is unliquidated, contingent, immaterial and disputed. The court stated at page 36:

> the threshold requirement of a claim must first be met—there must be a "right to payment".
>
> Section 77 of the Act required no such condition.

to asbestos pre petition and have manifested or will manifest disease post petition are parties in interest to this reorganization case.

Thus, this policy underlying the finding that mere exposure triggers coverage likewise militates in favor of a declaration that future claimants are parties in interest.

The reasoning in *In re Johns-Manville Corp.* is in harmony with the Third Circuit's decision in *In re Amatex Corp.* 755 F.2d 1034 (3rd Cir. 1985), wherein the Third Circuit reversed the district court and, in an apparent contradiction of the *Schweitzer* reasoning, recognized the existence of future claimant "interests" in on-going bankruptcy proceedings:

> We conclude that future claimants are sufficiently affected by the reorganization proceedings to require some voice in them. Moreover, none of the parties currently involved in the reorganization proceedings have interests similar to those of future claimants, and therefore future claimants require their own spokesman.

The court continued:

> Moreover, by terming future claimants parties in interest we do not prejudge the difficult questions of whether and how to protect their interests most effectively.

In re Amatex Corp., 755 F.2d at 1042-43.

In its disposition of Amatex, the Third Circuit in characterizing future claimants as parties in interest to the reorganization proceedings nevertheless deferred into the future a decision of "whether future claimants can or should be considered 'creditors' under the Code." *Id.* Subsequently, in *Schweitzer* it concluded that such individuals did not have "dischargeable claims" and were not therefore "creditors".[5] It would appear that the existence

[5] *In re Amatex Corp.*, 30 Bankr. 309 (Bankr. E.D. Pa. 1983), 37 Bankr. 613 (E.D. Pa. 1983), *rev'd*, 755 F. 2d 1034 (1985), like *In re*

UNR Industries, Inc., 20 Bankr. 741 (N.D. Ill. 1983), *appeal dismissed*, 725 F. 2d 1111 (7th Cir. 1984) is distinguishable from the case at bar in a number of material respects. Initially, both reorganization proceedings were voluntarily commenced by the respective manufacturers of asbestos products in fear of an anticipated proliferation of future asbestos related litigation and the potential liability and legal costs arising as a result thereof which would be beyond the company's ability to manage, control or pay. Secondly, both Amatex and UNR were being reorganized as ongoing concern. Thirdly, in both instances the courts were petitioined by the debtors to appoint a guardian to represent the interests of future asbestosis claimants. Fourth, no final order of discharge or consummated plan of reorganization had issued in either proceeding. Lastly, both actions were being conducted pursuant to the present Bankruptcy Code, 11 U.S.C. §101 *et seq.* and not under Section 77 of the Bankruptcy Act §205 which constituted Chapter VII of the Bankruptcy Act.

In both instances the district courts refused to appoint a representative to represent interests of individuals who had in some way been exposed to asbestos and who could eventually seek damages from the debtors for injuries resulting therefrom. In both cases the district courts' opinions evolved from an interpretation of the Bankruptcy Code, particularly 11 U.S.C. §101(4)(A), 101(9) and 105, and not Section 77 of the Bankruptcy Act. The courts reasoned that under the Code the existence of a claim sounding in tort accrued when an individual suffered injury. Thus, the claim of an asbestos plaintiff did not arise under *state law* until the plaintiff knew or should have known about the injury; consequently since asbestos exposed plaintiffs had no claim under state law for asbestos related diseases until injury became known, they had no cognizable claims under the Bankruptcy Code and were, therefore, not creditors.

In *In re UNR Industries, Inc.*, 725 F. 2d 1111 (7th Cir. 1984) the U.S. Court of Appeals for the Seventh Circuit dismissed the appeal for jurisdictional reasons by holding that the order of the district court was not a final appealable order and also failed to qualify under the "collateral order" doctrine created by the Supreme Court in *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

In its decision the court expressed serious reservation about the lower court's disposition of the matter when it stated:

> Even in states where exposed workers are not injured in a tort sense till the disease manifests itself, and therefore do not have an accrued tort claim in any sense, and even assuming that an

of future claimant "interests" within Third Circuit precedent would materially vary in pre-petition ongoing reorganization proceedings and post discharge final

[5] (Cont'd)

unaccrued tort claim cannot be a "claim" within the meaning of 11 U.S.C. §101(4)(A) (that is, a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"), a bankruptcy court's equitable powers (on which *see, e.g., Pepper v. Litton*, 308 U.S. 295, 304, 60 S. Ct. 238, 244, 84 L. Ed. 281 (1939); 1 Remington, A Treatise on the Bankruptcy Law of the United States §22 (Henderson 5th ed. 1950) just might be broad enough to enable the court to make provision for future asbestosis claims against the bankrupt when it approved the final plan of reorganization. The date on which a person exposed to asbestos happens to develop a diagnosable case of asbestosis is arbitrary. Could it not be argued therefore that a bankruptcy court can and should use its equitable powers, which traditionally "have been invoked to that end that . . . substance will not give way to form, that technical considerations will not prevent substantial justice from being done," 308 U.S. at 305, 60 S. Ct. at 244 (especially, perhaps, in a reorganization case, *see In re Michigan Brewing Co.*, 24 F. Supp. 430 (W.D. Mich. 1938)), to prevent the liquidation or discharge of the bankrupt before provision is made for such persons?

In re UNR Industries, Inc., 725 F. 2d at 1119.

As hereinbefore noted, the Third Circuit in *In re Amatex Corp.* reversed the district court and declared that future asbestosis claimants were cognizable parties in interest to the reorganization proceedings.

In commenting upon the logic expressed by the trial courts in *Amatex* and *UNR*, Judge Lifland in *In re Johns-Manville Corp.*, 36 Bankr. 743 (Bankr. S.D. N.Y. 1984) rejected, out-of-hand, the court's rationale on the issue of dischargeability:

> It is the view of this Court that the declarations by Judges Hart and King that these future claims are nondischargeable in bankruptcy are based on superannuated and considerably narrow notions of what constitutes a claim dischargeable in bankruptcy. These notions are at odds with the expanded definition of "claim" contained in Section 101(4) of the Code . . . Congress specifically intended to afford the broadest possible scope to the definition of "claim" so as to enable Chapter 11 to provide pervasive and comprehensive relief to debtors. 36 Bankr. at 754, n. 6.

dispositions. The Third Circuit failed to address the apparent contradiction between its decisions in *Amatex* and *Schweitzer.*

In summary, this court is impressed by the comprehensive analysis of Judge Fullam in *In the Matter of Penn Central Transportation Company*, 42 Bankr. 657 (E.D. Pa. 1984), which strikes to the very heart of the issue confronting this court. In that railroad reorganization proceeding the petitioners sought leave of the reorganization court to pursue antitrust actions against the Penn Central Corp. (PCC), the reorganized company which was formed as part of the Plan of Reorganization of the Penn Central Transportation Company (PCTC), the Debtor in Section 77 reorganization proceedings. The court had issued its confirmation of the Plan of Reorganization and its Order of Consummation of the Plan on August 17, 1978, and October 24, 1978, respectively pursuant to Section 77(f) of the Bankruptcy Act.

Notwithstanding the injunctions imposed by the orders and Section 77(f) against suits against PCC, petitioners filed complaints alleging antitrust actions against PCC and others on September 17, 1980 and March 5, 1981. The actions by Pinney Dock and Litton (Petitioners) were founded on conduct of PCTC or its corporate predecessors.

Petitioners' antitrust claims were obviously not satisfied or even considered under the Plan. It was agreed between the parties that the petitioners did not have evidence of the alleged antitrust conspiracy until 1979. The petitioners argued that an unknown and undisclosed claim could not have been discharged under Section 77 of the Bankruptcy Act. The district court framed the issue in the following terms:

> Petitioners' approach actually raises the issue of the finality of the Confirmation Order: Does this Court have authority to exempt petitioners' antitrust actions

or claims from the discharge of § 77(f)?

Penn Central, 42 Bankr. at 666.

The court thereupon traced the evolution of Section 77 from the 1947 Supreme Court decision rejecting a railroad debtor's effort to reopen a confirmed plan of reorganization and to modify the plan. *Insurance Group Committee v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 67 S. Ct. 583, 91 L. Ed. 547 (1947). It described the congressional reaction to the Supreme Court decision and the promulgation of P.L. 478 and its relationship to Section 77 of the Bankruptcy Act.

> Under P.L. 478, once an order of confirmation became final, the court could not reconsider or modify the plan. Finality of a confirmation order was defined to be expiration of the time within which to take an appeal or exhaustion of appeals which were taken.

Penn Central, 42 Bankr. at 666. The Court thereupon concluded:

> When §77 and P.L. 478 are considered together in the context of the finality accorded plans of reorganization and arrangement under Chapters X and XI of the Act, the conclusion which must be drawn is that a §77 plan of reorganization may not be altered once the order confirming the plan becomes final. Even if it is assumed that this court has residual equitable power to permit petitioners to participate under the PCTC's Plan of Reorganization, any potential exercise of that authority at this late date must be considered in the context of the long-standing bankruptcy policy that confirmation orders are final and the rights of the original participants under the Plan and third parties dealing in reorganization securities must be adequately protected.

Id. at 667.

Judge Fullam's concise disposition of the finality issue is an appropriate summary of the arguments presented by the parties to the case at bar.

La Scala-Henning and Conrail further charge a procedural due process infringement in the form of the Debtor's failure to provide adequate notice of the reorganization proceeding to permit interested parties to be heard. La Scala-Henning, although not claiming a total absence of notice, assert the right to personal notice. Conrail, on the other hand, disclaims notice in any form whether personal or by publication.

The Bankruptcy Act imposed wide discretion upon courts to designate the time and form of notice due with the caveat that such notice and opportunity for hearing be reasonable and appropriate in each case. *In re DCA Development Corporation*, 489 F.2d 43 (1st Cir. 1973). The court, in each instance, is required only to balance the individual's interest against the overall interest of efficient, final resolution of the claims, always mindful of the diminution of the Debtor's assets that may result from delay.

The First Circuit in *DCA* also stated:

> Moreover, even where formal notice to affected parties is omitted or is insufficient, informal or constructive notice which provides them with the same opportunity for a fair hearing can satisfy the procedural requirements of the Bankruptcy Act.

Id. at 47.

The conclusions articulated by the First Circuit in *DCA* merely restated the ultimate precedent enunciated by the Supreme Court as early as 1950 in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), which is dispositive of the Fourteenth Amendment due process issue of notice joined herein.

The due process infringement charged by La Scala-Henning, as interpreted by this court, is not the lack of notice but rather the form of the notice. More specifically, these putative claimants insist that only personal notice would have satisfied the constitutional require-

ments of due process. This contention is inapposite to existing precedent. *Mullane*; *American Land Co. v. Zeiss*, 219 U.S. 47, 31 S. Ct. 200, 55 L. Ed. 82 (1911). Apart from the foregoing, the putative claimants argue that "No notice issued during the course of the Erie reorganization proceeding was intended to, or did, provide any notice to future claimants that their unknown, unknowable, future claims would be discharged if they did not file proofs of claims." (Brief Conrail, p. 21) The argument infers an affirmative duty on behalf of the Debtor to notice claimants individually of the existence and nature of their claims. Neither Section 77 nor the Bankruptcy Act imposed such a requirement. Moreover, the Supreme Court in *Mullane* repudiated any such duty upon the Debtor to investigate or anticipate possible future claims under circumstances where, as here, the Debtor had no knowledge of the existence of such future claims:

> Nor do we consider it unreasonable . . . to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee . . . We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral, and we have no doubt that such impractical and extended searches are not required in the name of due process.

339 U.S. at 317-18.

The Bankruptcy Act placed the duty to assert claims squarely upon the shoulders of the claimant.

In the interests of conserving time and space, this court will not review its implementation of the generous provisions of Section 77(c)(7) and related sections of the Act that outlined the proof of claim requirements. Suffice

it to say that the procedure adopted and pursued by this court conformed to or exceeded the mandates imposed by law. The liberal procedure was closely monitored by a Special Master appointed by the Court. Apart from soliciting the filing of claims by personal and constructive service, extensive public notice of filing dates and procedures for obtaining simplified standardized forms was widely publicized. Moreover, it is interesting to note that employee interests were effectively protected by the Railway Labor Executives Association (RLEA)[6] and the

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[6] On November 19, 1972 the Railway Labor Executives Association (RLEA) moved this court to intervene as a party in interest to the reorganization, which motion was granted. The RLEA alleged that its intervention was predicated upon the following facts as asserted in its motion:

> The individual organizations [hereinafter listed] are the duly recognized representatives under the Railway Labor Act, 45 U.S.C.A. 151 *et seg.* for a substantial number of all railroad employees in the United States and have negotiated collective bargaining agreements with individual railroads pursuant to such representation . . . The employees of the Debtor Erie-Lackawanna Railway Company represented by the individual railway labor organizations affiliated with the Association have a substantial property and financial interest in actions which may be taken during the course of the present proceedings . . . The interest of the employees represented by the organizations affiliated with the Association will not be represented by any other party to this proceeding and such employees will be bound by judgments entered herein. The Association therefore submits that the grant of the motion by it and those affiliated organizations which represent employees on [sic] the Debtor Railroad to intervene in this proceeding in representation of interest of the employees of the Debtor Railroad, whose employment is governed by collective bargaining agreements between the Debtor Railroad and such affiliated railway labor organizations, is appropriate . . .

Its listed affiliates are: American Railway Supervisors' Association; American Train Dispatchers' Association; Brotherhood of Locomotive Engineers; Brotherhood of Railroad Signalmen; Brotherhood Railway Carmen of the United States and Canada; Brotherhood of Sleeping Car Porters; Int'l Assn. of Machinists & Aerospace Workers; Int'l Brotherhood of Boilermakers and Black-

Congress of Railway Unions (CRU)[7] which tracked the reorganization of the Debtor from the dates of their intervention on November 19, 1972 and March 30, 1973, respectively, to the final consummation of the Plan in November of 1982. During that period of active and aggressive participation in the reorganization of the Debtor by these organizations, nothing foreclosed the

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[6] (Cont'd)

smiths; Int'l Brotherhood of Electrical Workers; International Brotherhood of Firemen & Oilers; International Organization Masters, Mates & Pilots of America; National Marine Engineers Beneficial Association; Railroad Yardmasters of America; Railway Employes' Department, AFL-CIO; Sheet Metal Workers' International Association.

[7] On March 30, 1973 the Congress of Railway Unions (CRU) moved this court to intervene as a party in interest to the reorganization, which motion was granted. The CRU alleged that its intervention was predicated upon the following facts as asserted in its motion:

> The railway labor unions listed above are the legally selected and duly recognized representatives of the majority of all railroad employees in the United States . . . [T]he listed unions have negotiated collective bargaining agreements with virtually all of the railroads in the United States, including the Erie Lackawanna Railway Company . . . The employees of Erie Lackawanna Railway Company represented by the individual railway labor organizations affiliated with the CRU have a substantial property and financial interest in actions which may be taken during the course of the present proceeding . . . The interests of the employees represented by CRU through its member unions will not be represented by any other party to this proceeding and such employees will be bound by judgments entered herein.

The CRU includes as its members the chief executive officers of the hereinafter identified national and international railway unions: Brotherhood of Maintenance of Way Employes; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers; Express and Station Employes; Hotel & Restaurant Employes and Bartenders International Union; Seafarers' International Union of North America; Transport Workers Union of America; United Transportation Union.

initiation of action similar to that approved in *Amatex, supra* and *In re Johns-Manville Corp, supra* designed to protect the future rights of putative asbestos exposed employees before the final discharge of the Debtor and Consummation of the Plan. Such action would have permitted the trustees, creditors, security holders and the Court to consider the potential and magnitude of future claims in the formulation of the Plan and thereby would have insured against the catastrophic inequities that will arise as a result of post discharge post consummation recognition of such claims. This is especially true in light of the known injurious effects of asbestos exposure during the years before November 30, 1982, as is evidenced by the filing of more than 16,000 legal actions against manufacturers, distributors and installers of asbestos products during the years before August 26, 1982, the date on which Johns-Manville Corp. and its affiliates sought protection under Chapter 11, of Title 11 of the United States Code as a result of this great proliferation of asbestos litigation.

Equally without merit is Conrail's charge of defective notice when it is remembered that on April 1, 1976, most of the Debtor's properties and most of the Debtor's employees were transferred to Conrail. Throughout the restructuring of the northeast railroads, Conrail was an integral part of the reorganization proceeding. As a matter of fact, Conrail's existence was the direct result of the reorganizations of the northeastern railroads including the Debtor.

Under existing circumstances, it is inconceivable that the former employees of the Debtor and Conrail were not aware of the bankruptcy proceedings.

This court concludes that the notice by publication implemented during the reorganization proceedings pursuant to Section 77 of the Bankruptcy Act and the mandates of *Mullane* afforded La Scala-Henning and Conrail the opportunity to appear and be heard and to assert

their interests of whatever character during the pendency of the reorganization. Having failed to assert their interests which this court qualifies as claims under Section 77 of the Bankruptcy Act and, therefore, cognizable before the consummation of the Plan, La Scala-Henning and Conrail have lost the opportunity to have those interests evaluated in relation to the many other compelling and competing interests which were asserted during the reorganization.

The proceedings in reorganization having been concluded, the La Scala-Henning and Conrail claims are barred.

Accordingly, this court concludes that:

1. The purpose of Section 77 of the former Bankruptcy Act 11 U.S.C. §205 was to accord finality to reorganizations consummated under the Act.
2. A Section 77 claim "includes debts, whether liquidated or unliquidated, securities . . ., liens or other interests of whatever character" (former 11 U.S.C. § 205(b)) and the term "creditor" includes "all holders of claims of whatever character against the Debtor or its property." These definitions include the type of contingent or future claims asserted by La Scala-Henning and Conrail.
3. Claims were required to be filed in Section 77 reorganizations within the time fixed by the reorganization court, subject to the liberal provisions of Section 77(c)(7) for filing late claims. Under Section 77 of the Bankruptcy Act and the Bankruptcy Code, claims which were asserted after confirmation and consummation were discharged and there was no exception made for claims which were unknown to a claimant until after consummation of the Plan.
4. The La Scala-Henning and Conrail "claims" were cognizable during the reorganization proceeding

and were discharged by Orders No. 1222 and 1235 issued by this court.

5. After April 1, 1976 the Debtor's limited resources precluded its reorganization as an ongoing business entity and its Plan evolved pursuant to Section 77, as a "liquidating" plan consistent with §601(b)(4) of the Rail Act.
6. On April 1, 1976, the bulk of the Debtor's rail properties were conveyed to Conrail, thereby concluding the Debtor's tenure as an operating railroad.
7. On consummation of the Debtor's Plan of Reorganization, the remaining property of the Debtor was transferred to the reorganized company, Erie Lackawanna Co., free and clear of any claims against that property, and Debtor's liabilities of whatever character were discharged.
8. The alleged tortfeasor Debtor Erie Lackawanna Railway Company no longer exists, and the reorganized company is not a corporate successor to the Debtor in the ordinary sense.
9. The comparative positions between La Scala-Henning and Conrail and those now holding interests in Erie, the reorganized company, and the balancing of those interests must be equated consistently with the policy dictates of Section 77. Any relief accorded to these putative claimants would ultimately prejudice the present owners and creditors of Erie by a diminution and dilution of their interests. Consequently, any relief in favor of the post confirmation putative claimants from the Order of Confirmation would be inappropriate and is denied.
10. No statutory or constitutional defects in the proof of claims program and the form notice implemented by the reorganization court having been demonstrated, the discharge under Section 77

and the Bankruptcy Act is an absolute bar to the post confirmation claims asserted herein.

It is therefore ordered that Erie's petition for declaratory and injunctive relief is hereby granted. Attorneys for Erie shall submit an order in conformity with this decision by not later than June 30, 1985.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY

Robert B. Krupansky,
United States Circuit Judge
United States Court of Appeals
for the Sixth Circuit
Sitting by designation

APPENDIX F

COSTS OF ASBESTOS LITIGATION*

James S. Kakalik, Patricia A. Ebener,
William L. F. Felstiner, Michael G. Shanley

1983

OVERVIEW OF THE ASBESTOS LITIGATION PROBLEM

Asbestos product liability litigation is a large and complex problem because asbestos injuries are complicated, because large numbers of people allegedly have been injured, and because the law that controls their compensation is complex.[1] This section outlines those complica-

[1] For readers who are not familiar with product liability litigation, the following is a brief and greatly simplified sketch of its legal aspects. Personal injury suits brought by workers and others exposed to asbestos are almost always based on the legal theory of strict liability. These plaintiffs must demonstrate that they were exposed to asbestos or a product containing asbestos that was manufactured or provided by the defendant, and that they have suffered from a disease caused by such exposure. In most jurisdictions, they must be prepared to show that the defendant knew or should have known that the exposure to asbestos subjected them to a health risk. They must show that the defendant either failed to warn them of the risk or that the warnings were inadequate, and that the failure to provide an adequate warning was responsible for their injuries. Plaintiffs who can demonstrate each of these elements may not prevail if they are barred by a statute of limitations, or may find their cases postponed with respect to certain defendants by a bankruptcy court stay issued with respect to a defendant seeking Chapter 11 reorganization.

*Excerpts from study published by the Rand Corporation, pp. 2-6, 8-11.

tions so that the cost data that are the main contribution of this report may be understood in context.

The asbestos litigation problem has at least ten salient dimensions, each of which we will review briefly:

Widespread and diverse uses of asbestos products.

Large numbers of allegedly seriously injured people and lawsuits.

Long periods of time between exposure and manifestation of injury.

Large numbers of suppliers and processors of asbestos and asbestos-containing products.

Uncertainty about the causes of injuries and financial responsibility for those causes.

High, if uncertain, stakes and expenses.

Effects, known and unknown, of Chapter 11 bankruptcy reorganizations.

Concentration of many cases in few courts.

Possible impact on other toxic substance torts.

Variety of proposed responses to the problems.

Properties and Uses of Asbestos. Asbestos is a fibrous mineral that is mined. It is strong, flexible, and resistant to fire, heat, and corrosion. It is an excellent insulator and is also commonly used in asbestos-cement products (e.g., pipe), brake linings, a number of roofing products, and flooring products. It has been used in millions of buildings in the U.S. and in hundreds of millions of automobiles.

Large Numbers of Allegedly Injured People and Lawsuits. Unfortunately, asbestos also causes disease. Asbestos fibers when inhaled may lead to asbestosis (a clogging and scarring of the lungs that can produce disabling reduced breathing capacity), or mesothelioma (a rapidly fatal cancer of the lining of the chest and abdomen for which one of the known causes is asbestos). Inhalation of asbestos fibers also has been associated with an increased incidence of lung cancer. Approximately 24,000 claimants had initiated lawsuits as of March

1983 alleging injury from exposure to asbestos. Very few had filed ordinary liability insurance claims without filing a lawsuit.

Several estimates of the number of deaths allegedly due to asbestos over the next 30 years have recently been made. All are large—from 74,000 to 265,000.[2]

Long Latency Periods. Generally, 15 to 40 years elapse between asbestos exposure and disease manifestation. Thus, for example, some shipyard workers' are only now filing claims alleging injury from World War II exposure to asbestos.

Large Number of Defendants. Asbestos plaintiffs typically do not sue their employers (who are usually protected from tort responsibility by workers' compensation laws), but rather bring suits against the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant's work site or other exposure location. Thus, the potential defendants in any one case may consist of numerous organizations; the average is about 20. The cost implication is correspondingly major: Usually, 20 different defense teams prepare for and participate in litigation.

Uncertain Causes and Responsibility. Asbestos cases allege injuries that are often hard to identify with certainty, undetectable for decades after exposure, unpredictable from the simple fact of exposure, and arguably caused by a variety of other factors (such as smoking) that may produce the same pathology. It is not currently possible to establish precisely how much exposure to asbestos is either necessary or sufficient to cause any of the diseases allegedly associated with it, either with respect to any particular claimant or with regard to the universe of those exposed.

As a matter of strategy, many plaintiffs' lawyers seek

[2] For details, see "Overview of Previous Studies," below.

to involve as a defendant any party who might have provided asbestos or asbestos products to a client's workplace or other exposure location. Settlement efforts and trials must then face the difficult task of deciding whose products the plaintiff was exposed to and for how much of the time. But exposure is not the only issue. There may be disputes over which defendants had reason to know that asbestos exposure was a health risk and failed to warn of that risk, and disputes over the role of smoking or other plaintiff behavior in causing the alleged injuries.[3]

Determining the responsibility of insurance companies is every bit as difficult as that for defendants. Complex webs of insurance arrangements have been made, amended, unmade, and then remade by defendants over the decades during which most plaintiffs claim exposure to asbestos. For each defendant in each year, there is normally a separate set of layers of primary coverage, excess coverage, and reinsurance coverage. Also, there are often periods of self-insurance by the defendant, and occasionally insurance by a captive (defendant-owned) insurance company. Each layer of insurance in each year normally involves at least one carrier, and that carrier may or may not have been involved in that or another role during other years. Several major insurance carriers have many insured defendants, some of whom may have different interest, vis-a-vis each other, in any particular case.

The policies that provided coverage contain language that has given rise to protracted litigation concerning

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[3] Some research has found that susceptibility to lung cancer may increase by four to five times with exposure to asbestos, but by 50 times if the exposed subject also smokes. For a summary of this research, see Irving J. Selikoff, M.D., *Disability Compensation for Asbestos-Associated Disease in the United States*, Environmental Sciences Laboratory, Mount Sinai School of Medicine of the City University of New York, June 1981, Table 3.8.

the responsibility of the insurance carriers to respond to particular claims. In a nontrivial number of instances, it is even a serious issue whether any policy was in force; neither insureds nor carriers are able to produce papers that they had assumed long ago to be of no further relevance. But even where there is agreement that coverage did exist, there is nothing like accord between many defendants and their insurers, or among the insurers themselves, as to what is covered, when, and by whom. The basic uncertainty over insurance coverage has severely complicated relations between defendants and insurers, and has itself spawned a large number of lawsuits.

Besides that conflict, the role of the federal government is controversial. The government was, first of all, heavily involved with shipyards in various capacities; but it is also alleged by some to be responsible for worker injuries as a seller of asbestos, as a specifier of workplace safety standards for asbestos, and as a mandator of asbestos use in the military products it contracted for and purchased during and since World War II.

High Compensation Stakes and Expenses. Aggregate compensation to plaintiffs in asbestos cases will involve very substantial sums. This report provides data to increase the reliability of projections. Existing estimates vary from $4 billion to $38 billion over the next 30 years.[4] The expenses incurred in this litigation are also substantial. They have been alleged by others to equal, or perhaps exceed by four-fold,[5] the net compensation received by injured claimants.

The Chapter 11 Reorganizations. A new set of conditions and problems has been produced by the Manville Corporation, UNR Industries, and Amatex Corporation bankruptcy proceedings. A central issue is whether the

[4] For details, see "Overview of Previous Studies," below.

[5] David Lauter, "Footing the Bill for Toxic Torts," *National Law Journal*, January 31, 1983.

bankruptcy court can estimate and provide for future claims as part of a plan of reorganization. But the disruption caused by these bankruptcies has affected many different activities. Existing cases have been stayed with respect to defendants who have filed for Chapter 11 reorganization, the bargaining positions of both plaintiffs and defendants have been affected (but in ways not yet fully clear), and attorneys on both sides have been forced to spend substantial time concerned with the interests of existing and future claimants in bankruptcy instead of tort proceedings. The situation is dynamic and the ultimate impact on costs is as yet unclear.

The Concentration of Cases. Slightly over half of the pending cases are in the federal courts. Most of the state actions are pending in a dozen or fewer urban courts. The main factors determining where cases are filed seem to be (a) the degree to which the state law is perceived to be relatively favorable to asbestos plaintiffs, and (b) proximity to major users of asbestos, particularly World War II shipyards, which by themselves account for about half of all outstanding cases. Some major jurisdictions have very few asbestos suits; for instance, in New York the statute of limitations has been construed to run from the point of last exposure, so that the deadline for filing usually falls during the latency period before any disease can be detected. But the courts where the suits are concentrated have them in very large numbers, as in Los Angeles and Philadelphia, for example.

Impact on Other Toxic Substance Torts. The shape that responses to the problems posed by asbestos claims ultimately take is critically important to tens of thousands of injured workers and their families, to the businesses involved in asbestos mining, distribution, and use, to their insurers, perhaps to the government, and to the civil litigation system. The asbestos problem may be unique and hence warrant its own unique solution; on the other hand, it may be important as a precedent for other

toxic substances, especially if they are determined to have major consequences for public health.

Proposed Responses. Because the asbestos problem is immense and because it may influence public reactions to a set of major health and legal problems, many different responses have been and are being proposed. At least three generic lines of reform have been suggested by various people and organizations: Increased coordination and efficiencies within the existing tort system are being explored broadly and in depth; mediation, arbitration, and other forms of dispute resolution systems are being considered as alternatives to formal litigation; and various new, government-mandated compensation systems have been proposed. However, cooperation between agents of plaintiffs and defendants/insurers has been limited to date, as has the progress of federal legislation dealing with asbestos.

Fundamentally, the seriousness of the asbestos litigation problem rests on the facts that much human suffering is involved and that the financial consequences are so large and uncertain as to threaten the very viability of some of the corporate participants. This latter fact has been driven home by the bankruptcy filings that have already occurred. Some firms perceive the cost figures as large enough to move the problem out of the "difficult but manageable" class into the class of "this one could break us."

* * * *

OVERVIEW OF PREVIOUS STUDIES

A 1976 survey of approximately 3,000 product liability lawsuits by the Insurance Services Office[8] included only 51 asbestos-associated claims; of these, 29 received total compensation averaging $48,000 paid between July 1976

[8] Insurance Services Office, *Product Liability Closed Claim Survey: A Technical Analysis of Survey Results*, New York, 1977, p. 366.

and March 1977.[9] Expenses were not reported separately for asbestos cases. Since the great majority of closed asbestos-related lawsuits were closed in the 1980s, these few 1976 cases are mainly of historical interest.

A major study completed in 1981 by Irving Selikoff and his associates for the Department of Labor described and analyzed compensation experiences resulting from asbestos-associated occupational diseases.[10] They estimate that more than 21 million U.S. workers are still alive who were significantly exposed to asbestos over the last 40 years, and project 200,000 excess deaths (above the number normally expected in the population) by the end of the century from asbestos-associated disease. As a part of the Selikoff study, Peter Barth[11] conducted a study of compensation paid for asbestos-associated disease in 2,271 asbestos insulation workers who died between 1967 and 1976. He obtained data on 105 deaths that resulted in product liability lawsuits. The average court award for the eight tried cases was $57,750, and the average litigation expense paid by the plaintiff was $16,600. For 59 cases that resulted in settlements, the average compensation was $72,000, and the average litigation expense paid by the plaintiff was $28,500. (For cases where both legal fees and settlement were known, litigation expenses averaged 37 percent of the settlement amount, but ranged from 8 to 73 percent.) The incidence of lawsuits averaged 16 percent but rose with time from

[9] The $169,000 average per-claim figure that is often quoted from this ISO report was obtained by assuming the payment made in 1976 had actually been paid at the time of the "occurrence" of the bodily injury, and then *inflating by 25 percent per year.* The actual amount paid, however, averaged $48,000, not $169,000.

[10] Selikoff, op. cit.

[11] Peter S. Barth, *Compensation for Asbestos-Associated Disease: A Survey of Asbestos Insulation Workers in the U.S. and Canada*, Environmental Sciences Laboratory, Mount Sinai School of Medicine of the City University of New York, January 1981.

3 percent for 1967-1968 deaths to 32 percent for 1975-1976 deaths. The average compensation by cause of death for this small sample of cases was $46,000 for asbestosis, $61,000 for lung cancer, and $100,000 for mesothelioma.

A 1982 study headed by Paul MacAvoy[12] forecast the number of excess asbestos-related deaths and disabilities over the next 30 years, and estimated the resulting compensation payments generated by product liability lawsuits. The study reviewed various epidemiologic study projections and estimated excess mortality due to asbestos through the year 2015 at between 154,000 and 450,000, with the most likely estimate being 265,000. Since not all asbestos-related deaths will result in lawsuits, MacAvoy used information from Barth[13] to extrapolate the number of new lawsuits that would be filed. MacAvoy estimated that approximately 200,000 deaths will result in lawsuits.[14] The study further estimated that future compensation payments would be between $8 billion and $87 billion, with the "most likely estimate" of the present value[15] of the awards being $38 billion. The wide range indicates the high degree of uncertainty in the estimates. The low estimate is based on $100,000 per claim (obtained by inflating data on the amounts paid to survivors of only 105 asbestos insulators over the period 1967-1976).[16] What

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[12] Paul W. MacAvoy et al., "The Economic Consequences of Asbestos-Related Disease," Yale University School of Organization and Management, New Haven, Connecticut, Working Paper No. 27, January 1982.

[13] Barth, op. cit.

[14] Calculated by The Institute for Civil Justice from data presented in MacAvoy, op. cit. MacAvoy assumes that 32 percent of excess deaths resulted in litigation in 1975, that the percentage grew 4 percent per year, and that after 1992 all excess deaths will result in litigation.

[15] Future dollars discounted to 1980 present value dollars at 2 percent per annum.

[16] Barth, op. cit.

MacAvoy calls the "most likely estimate" is based on $233,000 per claim (obtained by inflating 1976 adjusted data from the previously mentioned ISO survey of product liability claims,[17] which included only 51 asbestos-related claims).[18] MacAvoy's "high estimate" is based on $350,000 per claim (obtained by averaging amounts reported in the *Asbestos Litigation Reporter* between August 1979 and September 1981; these predominantly were awards from trials that averaged substantially higher than the much more prevalent settlements). MacAvoy estimates defense legal and other expenses of this litigation to be 34 percent of awards and settlements, using data on all product liability cases closed in 1976 (only a few of which involved asbestos).[19]

The investment firm of Conning & Company has estimated that the insurance industry's ultimate liability for asbestos claims will be in the $4 to $10 billion range. The firm estimates the total number of claims filed by the year 2010 will be in the range of 83,000 to 178,000, which means at least 59,000 new claims above the 24,000 filed as of March 1983. The firm estimates that the average settlement was $35,000 per claim in 1980-81, but did not present data on expenses, which it assumes equaled the settlement amount.[20]

The Manville Corporation, in support of its Chapter 11 bankruptcy filing, has estimated that at least 32,000 new asbestos-related claims will be filed through the year 2001[21] that could require it to spend approximately $2

[17] Insurance Services Office, op. cit.

[18] Ibid. The actual unadjusted compensation per claim closed in that year averaged $48,000.

[19] Ibid.

[20] Conning & Company, *The Potential Impact of Asbestos on the Insurance Industry,* Hartford, Connecticut, September 1982.

[21] The Manville Corporation, "Summary of Asbestos-Related Litigation Projection," delivered to the organizational meeting of creditors of The Manville Corporation, New York, September 9, 1982.

billion. These estimates assume no increased propensity to sue over time, and a $40,600 disposition cost per case for the Manville Corporation and its insurers. By the year 2009, a study commissioned by the Manville Corporation foresees 5,963 new mesothelioma suits, 2,660 new lung cancer suits, and 27,150 new asbestosis suits.[22] The $40,600 figure was estimated by the Manville Corporation by taking an average expenditure per claim weighted by the number of claims of each type; specifically, they averaged their "current costs" of $75,000 in compensation per mesothelioma case, $45,000 per lung cancer case, and $25,000 per asbestosis case, plus average defense costs of approximately $7,500 for each case.[23] The $7,500 figure amounts to 23 percent of the compensation paid to the claimant.

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[22] A. W. Walker, *Projections of Asbestos-Related Disease 1980-2009, Final Report*, Epidemiology Resources, Inc., Chestnut Hill, Massachusetts, August 2, 1982, estimates 18,700 excess mesothelioma deaths and 55,120 excess lung cancer deaths through the year 2009.

[23] Testimony of Richard B. Von Wald, Vice President and Corporate Counsel, The Manville Corporation, at the *Oversight Hearings on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims*, Subcommittees on Labor Standards, Committee on Education and Labor, U.S. House of Representatives, Washington, D.C., September 9, 1982, p. 66.

APPENDIX G

Bankruptcy Act of 1898, former 11 U.S.C. §205:

Section 77. Reorganization of Railroad Engaged in Interstate Commerce.

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization.

* * * *

If the petition is . . . approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose.

* * * *

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded

debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

* * * *

The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" included debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for al purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon the effective date of this amendatory section) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which

hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property.

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(4) The judge shall require the officers of the debtor or the trustee or trustees at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

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(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or inden-

ture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees in the representative or representatives of such holders for the purpose of accepting or rejecting any plan or reorganization.

(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise.

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(d) The debtor, after a petition is filed as provided in sub-section (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less then 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less then 10 percentum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity

shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the nommission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of

this section, is fair and equitable, affords due recog nition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such masimum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

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If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: Provided, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding

the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less then the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: Provided further, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less then the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. . . . The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more then two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after

hearing, that it makes adequate provision for fair and equitable treatment for the interests of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e).

* * * *

If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his con clusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

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(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed whether or not approved, including creditors who have not, as well as those who have, accepted it. . . . The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the

plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provis ions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case.

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(j) In addition to the provisions of section II of this Act for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: Provided, That suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction and any order staying the prosecution of any such cause of action or appeal shall be vacated.

* * * *

(k) A certified copy of the final order confirming a plan of reorganization, or of any other order or decree entered in a proceeding under this section, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the order or decree was made.

A certified copy of an order directing the transfer and conveyance of the property dealt with by the plan as provided in subsection (f) of this section, or as specified in an order dismissing the proceedings as provided in subsection (i), shall be evidence of the transfer and conveyance of title accordingly, and if recorded shall impart the same notice that a deed, if recorded, would impart.

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(m) The term "railroad corporation" as used in this amendatory section means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment. Wherever used in this section the term "person" shall include an individual, corporation, partnership, association, joint-stock company, unincorporated organization, or a government or political subdivision thereof.

(n) In proceedings under this section and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation. arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds executed by sureties without security for and in any action brought against such railroad corporation or trustee appointed pursuant to this section, shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad. . . .